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In The

Supreme Court of the United States

October Term, 1995

SAUL ORNELAS and ISMAEL ORNELAS-LEDESMA,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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SELECTED DOCKET ENTRIES *

*The docket numbers are those used in Ismael Ornelas-Ledesma's case. The docket numbers for Saul Ornelas are in brackets.

Date	Number	
12-30-92	12	Deft.'s motion to suppress seizure of items from the 1981 Olds. and the statement of the deft. taken at the scene & later that day at the station-house. (No supporting brief).
12-31-92	[12]	Deft's statement on motions.
12-31-92	[13]	Deft's motion to suppress statements; Memorandum in support of motion.
12-31-92	[14]	Deft. notice of motion and motion to suppress and exclude physical evidence; memorandum in support of motion.
1-11-93	14	Govt' memorandum in response to deft.'s pretrial motions.
1-12-93	[20]	Deft's reply; affidavit of deft.
1-14-93	16	Deft.'s reply to Gov't memorandum in response to deft.'s motion to suppress the seizure of items from the 1981 Olds and the statements of the deft. taken at the scene and later at the stationhouse.
1-15-93	18	Deft's motion to supplement reply brief.

1-15-93	[22]	Affidavit of Saul Ornelas.
1-21-93	24	HEARING (RLB) Evidentiary hearing. Interpreter (C. Ward) swore. Govt. addresses crt. as to contested facts. Crt. finds Gov't. has not fulfilled burden as to 6.03. Witness test. given. Gov't. offers Ex. 1, 2, & 2A. Exhibits and transcripts received. Crt. admits exh. 3 & 4. Gov't. objects as to #4.
1-22-93		HEARING (RLB) Evidentiary hearing cont'd. Gov't. addresses crt. as to Ex. 2A. Crt w/allow deft. to listen to original tape. Witness test. given. Gov't offers Ex. 6 & 6A. Atty LeBell objects. Integrity of tape in question. Crt. w/accept Ex. 6 and 6A. Govt. Ex. 5 received. Deft. offered Ex. D. Crt. allows. Ex. B. offered and received. Ex. 7 offered and admitted. Ex. F. G. & H. offered and admitted. Ex. I & J offered and admitted. Gov't. objects.
1-25-93		HEARING (RLB) Evidentiary Hearing Contd. Govt. moves to quash subp. of witness Allen & docs. Crt. holds motion in abeyance. Crt. will not order hard copy of NADDIS ck. on 12/11/92 Exh. 12 offered Govt. objects. Crt. will allow. Defts. seeks metallurgist expert. Crt. directs motions made to RTR. [District Court judge]. BRIEFS due 2-9-93 at 5:00 p.m. Atty Gleason seeks until 1-29-93 to obtain expert & supplement. Crt. w/allow further evidence.

		Counsel w/make proffer to Govt. Briefing w/remain as set.
1-28-93		HEARING (RLB) Evidentiary hearing re: screw. Crt. has conferred w/Govt. and counsel. Govt. produced screw indicated at previous hrg. Parties believe should be admitted into evidence. Govt. waives deft. presence. Atty Gleason h/no objections. Govt. offers and crt. receives screw as Ex. AA. Stipulated by Govt. that screw has no rust. Crt. examined-can see no rust. Deft. W/D motion to have screw analyzed.
2-8-93	43	Brief of Ismael Ledesma in support of motion to suppress statements and items seized f/automobile.
2-9-93	29	Govt. memo in response to deft. pretrial motions.
2-9-93	[31]	Deft.'s brief in support of motion to suppress statements and items seized from the automobile.
2-12-93	30a	RECOMMENDATION (RLB). to Judge Randa RECOMMEND an order DENYING deft's motion to suppress seizure of items f/1981 Olds. & statements of deft. Objection t/be filed on or before 2/19/93 at 8:30.
2-17-93	[35]	Deft's Objections to Magistrate Judge's Recommendations.
2-18-93	[36]	Govt's objections to Magistrate Judge's Recommendations.

2-19-93	31	Deft. objections to Magistrate recommendations.
3-9-93	35	ORDER (RTR) that defts' objections to Mag.'s recommendations be OVERRULED; Defts' motions to suppress certain post-arrest statements and physical evidence be DENIED.
3-11-93	36	HEARING (RTR) Deft. motion for reconsideration is DENIED. Deft. enters conditional guilty plea. – R. 11(a)(2) to count 1 of the indictment. ADJUDGED GUILTY. Sentencing set for 5-20-93 at 10:00 a.m. in rm. 253. Mr. Gleason's request for transcripts is GRANTED. Deft. remanded to custody.
3-11-93	[41]	HEARING (RTR) Change of plea. Interpreter present. Deft's motion for reconsideration is DENIED. Deft. enters a conditional plea – R.11(a)(2) to court [sic] 1 of the indictment. ADJUDGED GUILTY. Sentencing set for 5/20/93 at 2:30 p.m. in rm. 253. Deft. remanded to custody.
3-11-93	37	Defts' motion for reconsideration and inspection of Automobile.
5-20-93	38	HEARING (RTR). Sentencing: 60 months imprisonment. • • • • SUPERVISED RELEASE 4 yrs. • • • •
5-21-93	39	JUDGEMENT (RTR) in a criminal case. E.O.D. 5/28/93.

5-28-93	[45]	HEARING (RTR) Sentencing. SENT: Ct. 1-63 mos. imprisonment. • • • SUPERVISED RELEASE: 4 yrs with conditions. • • • •
5-28-93	[48]	AMENDED JUDGMENT (RTR) in a criminal case. • • •
6-29-93	44	Transcript of proceedings held on 1-21-93.
6-29-93	45	Transcript of proceedings held on 1-22-93.
6-29-93	46	Transcript of proceedings held on 1-25-93.
6-30-93	47	Transcript of proceedings held on 1-28-93.
6-30-93	48	Transcript of change of plea f/Saul Ornelas held on 3-11-93 which contains court ruling on motion for reconsideration.
2-10-94		DECISION OF SEVENTH CIRCUIT. Vacated and remanded to district court.
3-15-94	58	ORDER by Judge Rudolph T. Randa. Consistent with the 7th Circuit's remand order, the matter shall be referred to Magistrate Bittner for purposes of determining the credibility of Officer Luedke's testimony regarding the loose door panel. (kmf). [Entry date 3/17/94].
3-29-94	59	POST-REMAND RECOMMENDATION by Mag. Judge Robert L. Bittner to the Honorable Rudolph T. Randa concerning Defendants'

		Motions to Suppress. It is RECOMMENDED that the U.S. District Judge enter an order GRANTING deft. Saul Ornelas' motion to suppress and exclude physical evidence. It is FURTHER RECOMMENDED that the U.S. District Judge enter an order GRANTING that aspect of deft. Ismael Ornelas-Ledesma's motion to suppress items seized f/the 1981 Oldsmobile.
4-7-94	60	Government's OBJECTIONS to the Mag. Judge's Post-Remand Recommendation Re: Deft. Motion to Suppress. (kmf) [Entry date 4/12/94].
4-8-94	61	OBJECTIONS to Magistrate Judge's Post-Remand Reconsideration by defendants Saul ORNELAS and Ismael L. ORNELAS.
9-20-94	62	DECISION AND ORDER: (RTR). The Government's objection to the Magistrate recommendation is sustained and the defendants' motions to suppress are denied.
4-18-94		ORDER of the United State [sic] Court of Appeals Filed Circuit Rule 53 order PER CURIUM [sic]. AFFIRMED. Posner, Flaum, Manion. [94-3349, 94-3350].
4-18-94		Terminated on the Merits after Submission Without Oral Hearing; Affirmed, Written, Unsigned, Unpublished, Posner, authoring judge; Flaum, Manion. [94-3349 94-3350].

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAUL ORNELAS and ISMEAL [sic] LEDESMA ORNELAS,

Defendants.

Case No. 92-Cr-243

MAGISTRATE JUDGE'S RECOMMENDATION TO THE HONORABLE RUDOLPH T. RANDA AND ORDER

NATURE OF THE CASE

(Filed Feb. 12, 1993)

On December 15, 1992 a federal grand jury sitting in this District returned a one (1) count indictment against defendants Saul Ornelas (hereinafter referred to as Saul) and Ismeal Ledesma Ornelas (hereinafter referred to as Ismeal), charging them with violating 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 by knowingly and intentionally possessing, with intent to distribute, a mixture containing cocaine.

The defendants appeared before this Court on December 17, 1992 for arraignment, entering pleas of not guilty. Pursuant to the pretrial scheduling order, the defendants filed various pretrial motions which are ready for resolution and will be addressed herein. Previously, the defendants' motions to compel discovery were denied

by this Court's order of January 15, 1993, which was upheld on appeal by Judge Randa.

MOTIONS TO SUPPRESS

Defendants Saul and Ismeal move the Court for issuance of orders suppressing evidence seized on December 11, 1992 from their persons and a 1981 Oldsmobile bearing State of California license plate number 2YOY835, which was parked in front of room 4 of the Suburban Motel, 4600 South 27th Street, Milwaukee, Wisconsin. They contend their Fourth Amendment rights to be free from unreasonable searches and seizures were violated when law enforcement officers subjected them to an investigatory stop, without "reasonable suspicion"; searched the Oldsmobile without their consent and, without probable cause, conducted an intrusive search of the interior of the vehicle's right rear door by removing a plastic vent cover. Both defendants also seek suppression of statements obtained from them while they were in custody at the City of Milwaukee Police Department (hereinafter referred to as MPD) on the grounds such statements were obtained in violation of their *Miranda* rights and were involuntary.

These motions were the subject of an evidentiary hearing conducted by the Court on January 21, 22, and 25, 1993. At the hearing Milwaukee County Deputy Sheriffs (hereinafter referred to as MCDS) Michael Pautz, Lyle Luedke, Gil Pagan, Donald Hurrle, Roger R. Wiggins, and United States Department of Justice, Drug Enforcement Administration (hereinafter referred to as DEA) Special Agent (hereinafter referred to as SA) James Allen

appeared and testified on behalf of the government. A supplemental evidentiary hearing was convened on January 28, 1993 to admit into evidence a Phillips screw which had been removed from the plastic vent cover of the right rear door of the Oldsmobile, and to place upon the record the parties' stipulation that no rust appeared on the screw. Based on the testimony and evidence adduced at such hearings, as well as having considered the briefs and arguments of the parties, this Court makes its findings of fact and proposed dispositions of such motions.

Findings of Fact

On Friday, December 11, 1993 MCSD [sic] plain clothes Detective Michael Pautz, a twenty (20) year veteran who has been assigned to the Drug Enforcement Unit for two (2) year veteran who has been assigned to the Drug Enforcement Unit for two (2) years, was engaged in a routine survey of motels located along South 27th Street, Milwaukee, Wisconsin looking for drug trafficking activity. At the Suburban Motel, 4600 South 27th Street, Milwaukee, Wisconsin, he observed a 1981 two (2) door Oldsmobile automobile with California license plates 2YOY835 parked in front of room 4. Based upon his experience and training in drug interdiction, Pautz knew an older two (2) door GM vehicle is often used to transport drugs and California is a source state for controlled substances; consequently, he contacted his dispatcher to check on the license plate. The dispatcher advised Pautz the vehicle was listed to one Miguel Ornealas of 830 North 16th Street, San Jose, California with an additional name of "Ledesma." However, Pautz was not sure whether the dispatcher indicated the name

"Ledesma" came before or after the name "Ornealas." After speaking with the dispatcher, Pautz spoke with the motel clerk who disclosed, at 4:00 a.m. that morning, an individual named Ismeal Ornelas had checked into room 4 with another individual, without prior reservations, and was due to check out at 11:00 a.m.

Pautz then requested his partner, MCDS plain clothes Detective Donald Hurrle, meet him at the motel. Upon Hurrle's arrival in an unmarked car approximately fifteen (15) to twenty (20) minutes later, Pautz briefed him about the Oldsmobile and the occupants of room 4. Pursuant to Hurrle's suggestion, Pautz contacted the Milwaukee DEA office and asked for a Narcotics and Dangerous Drugs and Information Systems (hereinafter referred to as NADDIS) check on the names Ismeal Ornelas and Miguel Ledesma Ornealas. A short time later, Pautz was advised both names appeared on NADDIS and was given the ~~following~~ information: Miguel Ledesma Ornealas, a/k/a Miguel Ledesma-Lemus, with a date of birth September 29, 1945, 5'6', 150 pounds, Hispanic male was a heroin dealer from El Centro, California; Ismeal Ornelas, Jr., from Tuscon, Arizona was a 1,000 kilogram a month cocaine dealer. Pautz is not familiar with the geography of California and did not know that San Jose and El Centro, California are 600 miles apart. Upon receiving the NADDIS information, Pautz and Hurrle decided to conduct surveillance of room 4 of the Suburban Motel and to summon to the scene MCDS Detective Lyle Luedke, the narcotics dog handler for the Drug Enforcement Unit, because they suspected the Oldsmobile contained drugs.

Shortly after 9:30 a.m. Luedke, in plain clothes, arrived in an unmarked car at the scene, together with

the narcotics detection dog. In the K-Mart parking lot across the street from the Suburban Motel, Detective Hurrle advised Luedke they were conducting surveillance of room 4 of the Suburban Motel which they believed was occupied by a possible drug courier, Ismeal Ornelas, and another individual, whose identity was unknown. He was further advised checkout time for room 4 was 11:00 a.m. and, if time permitted, the exterior of the Oldsmobile should be "sniffed" by the drug detection dog.

Not long after Luedke arrived, Pautz departed the scene; Hurrle and Luedke repositioned themselves on the same side of the street at the Suburban Motel, because heavy traffic had obscured their view from the parking lot, and continued to conduct surveillance of room 4 from their separate cars which were parked approximately 250 yards away. After approximately forty-five (45) minutes, Hurrle observed an individual, later identified as Saul, open the hood of the Oldsmobile, tinker briefly under the hood, and start the ignition. He then returned to the room to pick up luggage and loaded it into the trunk. The other individual, later identified as Ismeal, exited room 4 and assumed a position in the front passenger seat of the Oldsmobile while Saul went briefly into the motel office. Shortly thereafter, Saul returned to the vehicle and positioned himself in the driver's seat.

At this point, the officers drove their separate unmarked vehicles to parking spaces on either sides of the Oldsmobile. However, the position of their cars did not box in the Oldsmobile and prevent it from leaving the scene. Both officers were dressed in plain clothes. Hurrle, who had no visible gun, proceeded to the driver's side of the vehicle and Luedke, who had a gun visible but not

drawn, proceeded to the passenger side. Hurrle identified himself as a law enforcement officer, asked the occupants of the vehicle whether he could speak to them, and inquired whether they were in possession of any illegal drugs or contraband. Both occupants responded, almost simultaneously, they had nothing illegal or anything like that. In response to a request for identification, both Saul and Ismeal produced identifying documents. Luedke reviewed the California driver's license produced by Ismeal, listing Ismeal's residence as Martinez, California. Ismeal responded in the affirmative to Luedke's inquiry whether he had just arrived from California. Luedke did not realize there was a discrepancy between the NADDIS report listing Ismeal Ornelas as being from Tucson, Arizona and the fact the Ismeal before him was apparently from California. The identification documents produced by Saul and Ismeal were retained by the law enforcement officers. At Hurrle's request Saul, the driver, consented to have the officers look inside the vehicle. In fact, Saul opened the trunk of the Oldsmobile with a key and held the trunk lid up to allow Hurrle to search it and the luggage inside. While the trunk was being searched, Saul was very calm and Ismeal was also calm, but shaking.

When Hurrle announced he had completed the search of the trunk, with negative results, Luedke proceeded to the passenger area of the vehicle and checked to see whether the back seat was loose. Upon finding it was not, he examined the right rear quarter panel near the handle. He found this panel to be loose. Based upon his training, Luedke suspected the panel had been removed and contraband was hidden inside. Luedke testified he then observed the vent area of the door, noticing

the presence of rust in the groove of the Phillips screw used to attach the vent cover, which led his to believe the vent cover had recently been removed. Luedke then released the screw, dismantled the vent area of the door, and exposed a cavity approximately five (5) inches high and four (4) inches wide which contained a paper bag in which he felt a hard block. After unsuccessfully attempting to remove the bag through the vent opening, Luedke removed the interior panel of the right rear door, retrieved the paper bag, and told Hurrle he had "found something." Luedke tore open the bag, revealing a block of cocaine wrapped in aluminum foil and tape.

At that point, the defendants were handcuffed, placed under arrest, and placed in separate cars. Sometime after the cocaine was found, Luedke had his dog sniff the Oldsmobile, but no other cocaine was detected. At the scene, Hurrle advised Ismeal of his *Miranda* rights after he was placed in Hurrle's car, although he was not questioned until approximately two (2) hours later at the MPD.

Upon arrival at the MPD, Ismeal was taken to an interrogation room approximately eight (8) by ten (10) feet in size, where he remained in leg irons for approximately an hour. At 1:08 p.m., Pautz again advised Ismeal of his *Miranda* rights and Pautz and Hurrle began to interview Ismeal. Shortly after the commencement of the interview, which was taped, Hurrle stated to Ismeal:

> I want to tell you if you cooperate with us we can make you one promise and one promise only . . . we will speak on your behalf to the Assistant District Attorney of the U. S. Attorney or to the Court if necessary and advise them

> that you cooperated with us, o.k. We cannot at this point tell you that you are not going to jail. We can't tell that you're going to get a lesser sentence because you cooperated with us. All we can tell you is one thing. We will speak on your behalf. We will tell them that you cooperated with us. That could mean a whole lot and more than likely will mean a lot to those people.

Sometime later in the interview, Hurrle told Ismeal "We'll tell the DA or the United States Attorney that you told us something and we found out later that it was a flat out lie and then you don't get in any deals more than likely." During the course of the interview, Ismeal stated he understood his *Miranda* rights, never asked for an attorney, he did not appear to be under the influence of alcohol or drugs, he was cooperative and experienced no difficulty communicating with the officers in English. The interview ended at 1:45 p.m.

At approximately 1:30 p.m. MCDS Gil Pagan, a 4-1/2 year veteran assigned to the Drug Enforcement Unit since September 1991 whose native language is Spanish and has been interpreting in an unofficial capacity for thirty-two years and in an official capacity since August 8, 1988, albeit without any formal training in interpretation, advised Saul of his *Miranda* rights using a standard English advice of rights cards which he translated into Spanish. After Pagan interpreted each right from English into Spanish, Saul stated he would be willing to cooperate.

About 2:00 p.m. Hurrle and Pautz entered the fourteen (14) by ten (10) conference room where Saul and

Pagan had been waiting and the interview of Saul commenced. Pagan acted as interpreter throughout most of the interview; however, there were times during the course of the interview where Saul understood questions posed to him by Hurrle and responded in English without the assistance of Pagan. Saul was advised that the only thing law enforcement officers would do for him, if he decided to cooperate, was to inform the D.A. or the Court of his cooperation, but that they did not guarantee him anything. During the course of the interview, Saul was coherent and fairly calm, although he seemed concerned about his situation. During the course of the interview, the deputies engaged in banter among themselves which was not translated into English by Pagan. Pautz asked, "Do they have courts in Mexico or do they have standard procedures." Hurrle responded "Due process? A wall?" In return, Pagan added, "Seven muskets in front of you?" The interview of Saul during which he made no incriminating statements lasted approximately thirty (30) minutes.

At approximately 2:45 p.m. Luedke reinterviewed Ismeal because he wanted to know how the cocaine got into the right rear quarter panel of the Oldsmobile – information which neither defendant had disclosed during their interviews. At the commencement of the interview, which was conducted in a five (5) by seven (7) foot room containing a desk, two (2) chairs, and an ashtray, Luedke advised Ismeal of his *Miranda* rights by reading verbatim from an advice of rights card. Pautz was present during the interview. No threats or promises were made to Ismeal and he was allowed to smoke. His demeanor was very solemn. Throughout the interview, he stated he

understood his rights and proceeded to make a statement that Saul had placed the cocaine in the cavity of the right rear quarter panel door.

At the hearing MCDS Sergeant Roger R. Wiggins, a twenty (20) year veteran who has been second-shift supervisor of the Communications Bureau for four (4) years, testified his bureau routinely runs Department of Motor Vehicle computer checks using state license plate numbers to obtain the owner's name, residence, and the make of car to which the license is listed. He stated additional information can be obtained by making an administrative request. On January 19, 1993 Wiggins made a license check and an administrative inquiry on the Oldsmobile. The initial request revealed the vehicle belonged to "Ornelas Miguel Ledesma" of San Jose, California. The administrative request showed the owner of the vehicle to be Miguel Ornelas, also known as "Ledesma Miguel Ornelas"; an updated San Jose, California street address; the owner's sex; date of birth; height; weight; hair color; and eye color.

Officer Pagan reviewed the administrative request and stated the alternative name listed for Miguel Ornelas was for a person named "Miguel Ornelas-Ledesma." He further testified the majority of Hispanics use their father's name first and then their mother's name.

Analysis

Although the government initially disputed the defendants' expectation of privacy in the Oldsmobile, during the course of the evidentiary hearing, it conceded both defendants had the requisite expectation of privacy

to allow them to assert that their Fourth Amendment rights had been violated by the search of the vehicle. Consequently, the threshold issue in this case is whether the defendants were subjected to a seizure by law enforcement officers. The law is well established that an encounter between a law enforcement officer and a citizen implicates the Fourth Amendment only if the officer seizes the citizen. *United States v. Mendenhall*, 446 U.S. 544, 555 (1980); *Terry v. Ohio*, 391 U.S. 1, 19 (1968). If a seizure does not occur; and therefore, the encounter is consensual in nature (limited to questioning about an individual's identity and requesting identification), then police do not need justification for this contact. *INS v. Delgado*, 466 U.S. 210, 216-17 (1984); *United States v. Dyer*, 784 F.2d 812, 815-16 (7th Cir. 1976); *United States v. Borys*, 766 F.2d 304, 310-11 (7th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986). The test for determining whether a police-citizen contact rises to the level of a Fourth Amendment seizure is an objective one. *United States v. Espinosa-Alvarez*, 839 F.2d 1201, 1205 (7th Cir. 1988); *United States v. Pavelski*, 789 F.2d 485 (7th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 322 (1986). This formulation is whether, based on the totality of circumstances, a reasonable person would believe his freedom of movement is restrained or believes he is at liberty to disregard a police officer's request for information. If the latter, then a seizure has not occurred. *United States v. Espinosa-Alvarez*, 839 F.2d at 1205.

In order to assess the reasonableness of the seizure, this Court must weigh the circumstances on the Fourth Amendment "scale" for police/citizen encounters. *See United States v. Chaidez*, 919 F.2d 1193, 1197 (7th Cir. 1990).

"[A] person has been 'seized' within the meaning of the Fourth Amendment. . . . only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (citations omitted). Recently the Court of Appeals for this Circuit summarized the three (3) categories for police/citizen encounters in relation to the Fourth Amendment as follows:

> The first category is an arrest, for which the Fourth Amendment requires that police have probable cause to believe a person has committed or is committing a crime. *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). The second category is an investigatory stop, which is limited to a brief, non-intrusive detention. This is also a Fourth Amendment "seizure", but the officer need only have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime. *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82, 95 S.Ct. 2574, 2580-81, 45 L.Ed.2d 607 (1975); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 2868, 20 L.Ed.2d 889 (1968). The third category involves no restraint on the citizen's liberty, and is characterized by an officer seeking the citizen's voluntary cooperation through non-coercive questioning. This is not a seizure within the meaning of the Fourth Amendment. *United States v. Mendenhall*, 446 U.S. 544, 553-55, 100 S.Ct. 1870, 1876-77, 64 L.Ed.2d 497 (1980); *Terry*, 392 U.S. at 19, n.16, 88 S.Ct. at 1879, n.16.

United States v. Johnson, 910 F.2d 1506, 1508 (7th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 764 (1991). *See also*,

United States v. Adebayo, No. 91-2138, slip op. at 8 (7th Cir. Feb. 5, 1993).

"So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required." *United States v. Williams*, 945 F.2d 192, 195 (7th Cir. 1991). "A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Withers*, 972 F.2d 837, 841 (7th Cir. 1992) (citations omitted).

The distinction between a consensual encounter and a stop is one of degree. Relevant factors include whether the encounter occurred in a public or private place, whether the suspect consented or refused to talk to the police, whether the police informed the suspect that he was not under arrest and was free to leave, whether the police removed the suspect to another area, whether the suspect felt capable of refusing to consent to the search, and whether the suspect eventually departs the area without hindrance. *See United States v. Withers*, 972 F.2d at 842. Other factors in this determination include: "The threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or the tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Withers*, 972 F.2d at 842 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554-55 ([1980]). Additionally, the "lengthy" retention of documents, such as identification and airline tickets, is

a factor in determining whether a stop has occurred. *See United States v. Withers*, 972 F.2d at 842.

Here, the encounter between the law enforcement officers and the occupants of the 1981 Oldsmobile was initially a *Terry* stop. Within moments of the encounter, Hurrle was in possession of their identification documents, questioning them as to whether they had drugs in the car, and requesting permission to search the vehicle. The defendants were never told they were not under arrest or that they were free to leave. At the time they approached the defendants, the law enforcement officers had knowledge of "specific and articulable facts which, when taken together with the rational inferences from those facts", could reasonably cause them to conclude, in light of their experiences, that criminal activity was afoot. *Terry v. Ohio*, 392 U.S. 1, 21 & 30 (1968). Pautz specifically testified it had been his experience that vehicles similar to the Oldsmobile are used to transport narcotics. In addition, Pautz learned the registered owner of the vehicle was from a source state, the owner's name came back on NADDIS as being a drug trafficker, and the name of Ismeal Ornelas, Jr. came back on NADDIS as also being a drug trafficker. An additional factor contributing to the reasonable suspicion of drug trafficking was the defendants' 4:00 a.m. check-in to the motel. Consequently, this Court concludes the defendants were subjected to an investigatory detention, based on reasonable suspicion, and the seven (7) to ten (10) minute detention until the cocaine was discovered was reasonable. *See Piska v. City of Stevens Point, Wis.*, 823 F.2d 1168, 1176 (7th Cir. 1987) (ten [10] minute stop reasonable); *United States v. Davies*, 768 F.2d 893, 902 (7th Cir.), *cert. denied*, 474 U.S. 1008

(1985) (forty-five [45] minute stop reasonable); *United States v. Kapperman*, 764 F.2d 786, 792 (11th Cir. 1985) (ten [10] minute stop reasonable).

The next question to be addressed is whether the Fourth Amendment was violated by the law enforcement officers' search of the Oldsmobile. The Fourth Amendment permits law enforcement officers to conduct a warrantless search, without probable cause, if an authorized individual voluntarily consents to the search. *Florida v. Jimeno*, ___ U.S. ___, 111 S.Ct. 1801, 1803 (1991); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). The burden is upon the government to demonstrate, by a preponderance of the evidence under the totality of the circumstances, that consent is freely and voluntarily given. *Schneckloth v. Bustamonte*, 412 U.S. at 222-27.

The record before the Court clearly establishes consent to search the Oldsmobile. Saul indicated the law enforcement officers could search the vehicle and neither defendant placed any restrictions on the areas the officers could search or, in the course of the search, asked them to stop. However, under *United States v. Garcia*, 897 F.2d 1413, 1419-20 (7th Cir. 1990), police may not dismantle parts of a car body to search for hidden compartments when they have merely obtained permission to "look in the car" for illegal drugs. Unless the police have probable cause to believe the car contains drugs concealed in hidden compartments, the opening of door panels is "inherently invasive and extends beyond consent given." *United States v. Garcia*, 897 F.2d at 1420. Here, Luedke's clear testimony was that rust within the groove of the head of the Phillips screw holding the plastic vent cover in place caused him to believe it had been removed and drugs

were concealed within the door panel. But, the screw itself belies this testimony. The record discloses no evidence from which Luedke could conclude that a hidden panel contained contraband. Consequently, the Court finds there was not probable cause to dismantle the panel.

Even though the search was beyond the scope of the consent and was not justified by independent probable cause, the cocaine found will not be suppressed as evidence under the inevitable discovery exception to the Fourth Amendment exclusionary rule of *Nix v. Williams*, 467 U.S. 431, 433 (1984), which holds if the prosecution can establish by a preponderance of evidence that the evidence ultimately or inevitably would have been discovered by lawful means, even if no violation of *any* constitutional provision had taken place, then the evidence should be received. The stated rationale for the doctrine is that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse position, than they would have been if no police error or misconduct had occurred in those circumstances where evidence would have been discovered independent of a constitutional violation. *Nix v. Williams*, 467 U.S. at 444. The court further stated that, under this doctrine, the prosecution is not required to prove the absence of bad faith as such a requirement would result in withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. *Nix v. Williams*, 467 U.S. at 445.

This Court finds, by a preponderance of the evidence, that regardless of the government's good or bad faith, the cocaine would have inevitably been discovered any way. This Court bases its conclusion upon the inevitability of a canine sniff of the Oldsmobile which does not compromise any legitimate interest in privacy and, therefore, is not a Fourth Amendment search. *See United States v. Vasquez*, 909 F.2d 235, 238 (7th Cir. 1990) (citing cases). Luedke's trained drug detection dog was waiting at the scene in his vehicle. Clearly, the defendants would not be allowed to depart from the Suburban Motel without their vehicle being "sniffed" if cocaine was not otherwise discovered. *See United States v. Buchanan*, 910 F.2d 1571 (7th Cir. 1990).

The final issue to be addressed is the admissibility of the statements obtained from Saul and Ismeal. The government has indicated it does not intend to introduce into evidence any statements made by Saul as a part of its case in chief. Thus, the sole issue as to Saul is the voluntariness of his statements under *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973), in the event the government intends to introduce his statement for impeachment purposes.

In *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), the United States Supreme Court detailed the factors to be considered when evaluating whether a defendant's "will was overborne" in the giving of statements:

> [T]he Court has assessed the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account include the youth of the accused, his

> lack of education, or his low intelligence, the lack of any advise to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the use of physical punishment such as the deprivation of food or sleep.

(Citations omitted.) Although Hurrle told Saul he would bring any cooperation on his part of the attention of prosecutors and/or the Court, there is no prohibition on the buying of information with honest promises of consideration. *See United States v. Rutledge*, 900 F.2d 1127, 1130 (7th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 203 (1990). The police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they are just not allowed to magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible. *See United States v. Rutledge*, 900 F.2d at 1130 (7th Cir.); *United States v. Harris*, 914 F.2d 927, 933 (7th Cir. 1990). There is no evidence the statement obtained from Saul was the result of his will being overborne. Thus, there is no basis for suppression of the statements of Saul.

Nor is there any basis for suppression of the statements obtained from Ismeal. Ismeal was advised of his constitutional rights, pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) and made a knowing and intelligent waiver of those rights as required by *Moran v. Turbine*, 475 U.S. 412 (1986). The record does not disclose that the statements which Ismeal seeks to suppress were obtained by overbearing his will. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

In this case, Ismeal made a knowing and intelligent decision to cooperate with law enforcement authorities and to provide them with certain information. Although Ismeal was told that any cooperation on his part would be brought to the attention of prosecutors and/or the Court, there is no evidence this representation overbore his free will. Since *Miranda* and its progeny are designed to protect criminal defendants from coercive police tactics which would produce involuntary confessions, they afford no protections to criminal defendants who, of their own volition, decide to make statements and otherwise cooperate with authorities.

In sum, this Court concludes no Fourth Amendment violation occurred when law enforcement officers stopped Saul and Ismeal. Furthermore, although the search of the Oldsmobile exceeded the scope of the consensual search, the cocaine would have been inevitably discovered and, therefore, is not subject to suppression. Finally, Ismeal's statements were not obtained in violation of his constitutional rights and Saul's statement was voluntary. Accordingly, this Court will recommend the defendants' motions to suppress evidence and statements be denied.

SAUL'S MOTION FOR SEVERANCE

Saul moves the Court for issuance of an order, pursuant to Fed. R. Crim. P. 14, severing his trial from that of Ismeal relying upon *Bruton v. United States*, 391 U.S. 123 (1968) which holds admission of a codefendant's confession at a joint trial where the codefendant does not testify and, therefore, cannot be cross-examined, violates a

defendant's Sixth Amendment right to confrontation. In the alternative, Saul seeks dismissal of the indictment.

In response the government indicates it has concluded it is not possible to redact Ismeal's confession to delete reference to Saul in a manner which does not still clearly implicate Saul. Consequently, the government concedes severance of the defendants' trials is necessary. Accordingly, Saul's motion for severance will be granted.

CONCLUSION

NOW THEREFORE, IT IS HEREBY RECOMMENDED that the United States District Judge enter an order **DENYING** defendant Saul Ornelas' motion to suppress and exclude physical evidence;

IT IS FURTHER RECOMMENDED that the United States District Judge enter an order **DENYING** defendant Saul Ornelas' motion to suppress statements;

IT IS ALSO RECOMMEDED that the United States District Judge enter an order **DENYING** defendant Ismeal Ledesma Ornelas' motion to suppress seizure of items from the 1981 Oldsmobile and the statements of the defendant; and,

IT IS ORDERED that defendant Saul Ornelas' motion for severance be and hereby is **DENIED.**

Written objections to the foregoing recommendations and orders may be filed in duplicate with the Clerk of Court on or before February 19, 1993 at 8:30 a.m. Failure to file a timely objection shall result in a waiver to your right to appeal.

Dated at Milwaukee, Wisconsin this 12th day of February, 1993.

BY THE COURT:

/s/ Robert L. Bittner
ROBERT L. BITTNER
United States Magistrate
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

-vs- Case No. 92-CR-243

ISMEAL ORNELAS LEDESMA and
SAUL ORNELAS,
Defendants.

DECISION AND ORDER

(MAR - 9 1993)

This matter comes before the Court on objections filed by the defendants, Ismeal Ornelas Ledesma ("Ismeal") and Saul Ornelas ("Saul"), to the Recommendations issued by Magistrate Judge Robert L. Bittner denying defendants' motion to suppress certain statements and physical evidence. For the following reasons, defendants' objections are overruled and the Magistrate's Recommendation is affirmed, although the Recommendation as to the suppression of physical evidence is affirmed on grounds somewhat different than these expressed by Magistrate Bittner.

Magistrate Bittner's Recommendation thoroughly explains the nature of the case and his corresponding findings of fact, which the Court incorporates here by this reference. In the interests of brevity, and having read the parties' initial briefs before the Magistrate and subsequent written objections, the Court summarily affirms the Magistrate's recommendations regarding (1) the finding

of reasonable suspicion for a *Terry*-stop; (2) the finding of consent for the vehicle search; and (3) the denial of both defendants' motions to suppress their post-arrest statements. With respect to the foregoing issues the Court simply adopts the reasoning contained in Magistrate Bittner's Recommendation, along with the factual findings he relied upon in reaching those conclusions.[1] Thus, the only question remaining is whether the cocaine seized

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[1] With one exception (the question whether Officer Luedke's gun was visible as he approached the defendants' vehicle – the parties agree that it was not), none of the parties attack the basic accuracy of the facts as found by Magistrate Bittner, although both defendants dispute the legal conclusions reached by the Magistrate based on those facts. For example, defendant Ismeal points to several facts which he feels are important to the issues but which the Magistrate did not address, and also disputes the Magistrates's characterizations of some of the underlying testimony and evidence. (Ismeal's Objection at 2-10.) Defendant Saul does the same, particularly with respect to the decision on the motion to suppress his post-arrest statements. (Saul Objection at 4-5), and then simply incorporates the arguments and facts contained in his initial briefing, which are essentially the same facts and characterizations of testimony stressed by Ismeal in his objection. (Saul Objection at 2.) The Court has taken into consideration the additional facts and differing characterizations raised by the defendants in these documents and finds that, even if true, they do not affect the Court's decision to affirm Magistrate Bittner's Recommendation on the three issues referenced above. The Court therefore adopts the Magistrate's factual findings as its own, with the exception of his finding that Officer Luedke's gun was "visible but not drawn" as he approached the defendants' vehicle. (Magistrate Recommendation at 5-6.) The Court, having read the objections of record and the transcript of Officer Luedke's testimony, hereby finds that Officer Luedke's gun was not visible as he approached the defendants' vehicle.

from the defendants' vehicle must be suppressed as the result of an invalid search.

I. SUPPRESSION OF PHYSICAL EVIDENCE.

Magistrate Bittner found that removing the door panel to find the cocaine at issue was a search that went outside the scope of the defendants' initial consent to search the vehicle, and further that the search could not be justified on grounds of probable cause. (Magistrate Recommendation at 15.) The Magistrate nonetheless denied the motions to suppress on grounds of inevitable discovery, finding that the police had a sniffer dog present at the scene which would have been used by the officers to find the cocaine if their own search proved unsuccessful. (Id. at 16.) The Court does not reject the Magistrate's holding regarding inevitable discovery[2], but

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[2] Under the doctrine of inevitable discovery, evidence obtained by unlawful means will not be excluded if the prosecution can establish, by a preponderance of the evidence, that the same information inevitably would have been discovered by alternate lawful means which the police were actively pursuing prior to the misconduct. *See generally, Nix v. Williams*, 467 U.S. 431 (1984). Here, the Magistrate found, and this Court concurs, that the officers had summoned a sniffer dog and dog handler to the scene prior to the search, and that the officers would have used the dog if the search had not proved successful. (Magistrate Recommendation at 16-17.) The Magistrate also found that a canine sniff would have found the cocaine at issue. (Id.) The defendants now object to this latter finding, arguing that there was no evidence submitted during the suppression hearing regarding the reliability of canine sniffs in general, or of sniffs by this dog in particular. (Saul's Objection at 2-3; Ismeal's Objection at 15-16.) The Magistrate apparently did not consider this question, perhaps because neither defendant raised the issue in their post-hearing briefs, or perhaps because both defendants' briefs seemed to admit the same by stating that "[d]ogs have been trained to sniff the exterior of cars and do react or alert to cocaine hidden in car bodies and in trunks." (See Saul's Brief at 19; Ismeal's Brief at 25-26.)

finds that holding unnecessary in view of the Court's belief that the facts found by Magistrate Bittner establish probable cause to remove the door panel at issue and search the compartment behind it.

The United States Supreme Court has cautioned lower courts not to become too technical or mechanical in their probable cause determinations:

> As the Court frequently has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief" . . . that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required. . . . "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same – and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

Texas v. Brown, 460 U.S. 730, 742 (1983). (Citations omitted.)

The Seventh Circuit requires the same flexibility. "Probable cause exists if the facts and circumstances within [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an item subject to seizure will be found in the place to be searched." *United States v. Garza-Hernandez*, 623 F.2d 496, 499 (7th Cir. 1980). "Probable cause is thus more than bare suspicion, but less than virtual certainty." *Id.* "As the term itself implies, probable cause exists if the probability is that the thing sought is in the place to be searched; probabilities are to be assessed in the light of practical experience and the practical inferences to be drawn from known or reliable facts." *Id.* "Government agents are entitled to reasonably rely on their special knowledge and expertise in assessing probabilities and drawing inferences." *Id.*

In cases involving a vehicle search, "[p]robable cause . . . exists when the facts and circumstances would lead a reasonably prudent person to believe that the vehicle contains contraband." *United States v. Strickland*, 902 F.2d 937, 942 (11th Cir. 1990). "The facts and circumstances upon which a finding of probable cause is based include "the sum total . . . and the synthesis of what the police have heard, what they know, and what they observe as trained officers." *Id.*, at 942-43. Moreover, in cases involving a *Terry*-stop based upon reasonable suspicion, information gathered after the stop may be added to information gathered before the stop for purposes of determining whether there is probable cause, and as such

the reasonable suspicion relied upon in making the stop may ripen into probable cause to search. *See generally, United States v. Van Lewis*, 409 F. Supp. 535, 542 (E.D. Mich. 1976); *United States v. Avalos-Ochoa*, 557 F.2d 1299, 1303 (9th Cir. 1977).

The Magistrate's decision on the probable cause issue focused upon the accuracy of one fact, *i.e.*, whether Officer Luedke was correct in his belief that a screw attaching the air vent to the door panel was rusted, giving rise to his belief that the panel had been recently removed. After the screw was produced and the parties stipulated to the fact that it was not rusted, the Magistrate ruled that there was no probable cause to search because "[t]he record disclose[d] no evidence from which Luedke could conclude that a hidden panel contained contraband." (Magistrate Recommendation at 15.)

The Magistrate's ruling would appear to run contrary to his own factual findings, and in any event does not consider the totality of the circumstances leading up to the removal and search of the door panel. The defendants and their car were singled out during a routine survey of motels conducted for the express purpose of looking for drug trafficking activity. (Magistrate Recommendation at 3.) The vehicle involved was a 1981 two (2) door Oldsmobile, an older GM model which is often used by drug traffickers to conceal contraband. (Id.) The car had California license plates, and its owner was listed as residing in California, a source state for controlled substances. (Id.) There were two individuals travelling together in the car, and they had checked into the motel at four o'clock in the morning, without reservations. (Id.) By itself this "drug courier profile", as the defendants call it, may not

constitute reasonable suspicion or probable cause. But then two NADDIS checks were run on the names of the car owner and the individual listed in the motel's registry, and both names turned up hits on known drug dealers.[3] (Id. at 4.) These hits, combined with the drug courier profile, clearly gave rise to a reasonable suspicion that drug trafficking activity was afoot and that the vehicle contained contraband of some kind. This reasonable suspicion became probable cause when Officer Luedke found that the right rear door panel of the car was loose, leading him to suspect that the panel had been removed and that contraband was hidden inside. (Id. at 6-7; Transcript of Off. Luedke's Testimony at 15-16.)

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[3] Much has been made of the fact that there appeared to be some minor discrepancies between the names and addresses of the individuals who turned up on the NADDIS check, and the names which the officers had actually obtained during their investigation. For instance, the name on the motel registry was "Ismeal Ornelas", and Ismeal's drivers license, which he produced prior to the search, indicated that he lived in California. The NADDIS hit, however, was for an individual named "Ismeal Ornelas, Jr.", who was listed as being a resident of Arizona. Similarly, defendants allege that the proper Hispanic translation of the name given to the officer as the owner of the vehicle was Miguel Ornelas-Ledesma, whose residence was listed as San Jose, California. The NADDIS hit was for a Miguel Ledesma-Ornelas, whose residence was listed as El Centro, California. Focusing on these discrepancies as a basis for defeating probable cause introduces requirements of certainty and absolute correctness into the analysis that were expressly proscribed by the Supreme Court in *Texas v. Brown*. It also ignores the fact that drug traffickers may be highly mobile, that the names at issue are virtually identical, that the names are associated with individuals fitting a drug courier profile, and that the names are further associated with a vehicle containing a loose door panel.

Thus, considering the totality of the circumstances, including the drug courier profile, the two NADDIS hits, and the lose door panel, this Court finds that an officer of reasonable caution would be justified in the belief that contraband would be found behind the right rear door panel.[4] This conclusion is further supported by decisions from the Seventh Circuit finding that the amount of probable cause necessary for the police to do something, such as conduct a search, "depends on how deeply they invade the zone of privacy", *United States v. Concepcion*, 942 F.2d 1170, 1173 (7th Cir. 1991), and that "the reasonable expectation of privacy that persons may have in their autos is usually of a lesser magnitude than privacy expectations that inhere in other types of property." *Garza-Hernandez*, 623 F.2d at 500. Given this lower expectation of privacy, and the confluence of the above facts and circumstances, the officers clearly had probable cause to remove the door panel.[5]

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[4] The fact that the screw holding the air vent to the door panel was not rusted, as Officer Luedke had testified, does not destroy probable cause. According to his own testimony, Luedke already had reason to believe the panel had been removed, and contraband hidden inside, by virtue of the fact that the panel was loose. (Luedke Transcript at 15-16; Magistrate Recommendation at 6-7.)

[5] Of course, the above analysis only resolves the probable cause issue, which is only half of the analysis under the Fourth Amendment. Even with probable cause, officers must first obtain a warrant to search, unless the circumstances fall within one of the exceptions to the warrant requirement. Here, the exception is obvious, *i.e.*, the "automobile exception". The "automobile exception" allows the warrantless search of a vehicle where probable cause exists to believe that the vehicle contains contraband or evidence of criminal activity. *United States v.*

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. The defendants' objections to the Magistrate's Recommendation are overruled, and the defendants' motions to suppress certain post-arrest statements and physical evidence are denied; and

2. No objection being taken to the Magistrate's Order granting Defendant Saul Ornelas' motion for severance[6], the same is affirmed.

Dated at Milwaukee, Wisconsin, this 9th day of March, 1993.

SO ORDERED,

/s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
U.S. District Judge

McGuire, 957 F.2d 310, 314 (7th Cir. 1992). The exception is justified by the vehicle's ready mobility and the lesser expectation of privacy people have in their automobiles. *United States v. Gallman*, 907 F.2d 639, 641 (7th Cir. 1990).

[6] As Defendant Saul Ornelas correctly points out, the Magistrate's Order contains a typographical error on the last page, which states that the defendant's motion for severance was "denied" rather than "granted". The analysis contained on the page preceding the type makes it clear that Magistrate Bittner was granting the motion, not denying it, and that the statement on the following page was in error.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
Plaintiff,

Case #92-CR-243

VS.

ISMAEL ORNELAS LEDESMA, and
SAUL ORNELAS,
Defendants.

MOTION FOR RECONSIDERATION AND INSPECTION OF AUTOMOBILE

(Filed Mar. 11, 1993)

This court in its Decision and Order of March 9, 1993, received at the Law Offices of Brian Gleason on March 11, 1993 makes a determination that there existed probable cause to believe that drugs were hidden inside the car's body on the basis of testimony on the part of detective Luedke that the, "right rear door panel of the car was loose, leading him to suspect that the panel had been removed and that contraband was hidden inside."

Luedke's testimony, at 16, was as follows:-

> Q.- What, if anything, did you discover when you were physically inspecting the inside panel?
>
> A.- I discovered that a portion of that panel approximately ten inches by six inches appeared to be or didn't appear but physically felt like it was somewhat loose.
>
> Q.- Based upon your training and experience, what if anything did that mean to you?
>
> . . . .

A.– I considered it was a possibility that that panel had been removed and there could be something concealed in that area.

The magistrate's finding of fact at 6, states in relevant part, "[H]e examined the right rear quarter panel near the handle. He found this panel to be loose. Based upon his training, Luedke suspected the panel had been removed and contraband was hidden inside. Luedke testified he then observed the vent area of the door, noticing the presence of rust in the groove of the Phillips screw used to attach the vent cover, which led him to believe the vent cover had been removed."

It is clear that in this portion of the opinion the magistrate is merely reciting the testimony, not adopting the testimony as a clear finding. We know this because in his "Analysis" section, beginning at page 10, the magistrate sifts through the testimony and attaches credibility determinations.

As to the testimony of Luedke, concerning the rusty screw head, the magistrate states at 15, "Here, Luedke's clear testimony was that rust within the groove of the head of the Phillips screw holding the plastic vent cover in place caused him to believe it had been removed and drugs were concealed within the door panel. But, the screw itself belies this testimony. The record discloses no evidence from which Luedke could conclude that a hidden panel contained contraband. Consequently, the Court finds there was not probable cause to dismantle the panel."

The magistrate earlier referenced the testimony about the door panel being loose, and later makes a finding that

there was "no evidence from which Luedke could conclude . . . " It is obvious that the magistrate similarly made a credibility determination concerning Luedke's testimony about the panel being, "somewhat loose." Tr. at 16.

Prior to the magistrate's decision and after the "rusty screw being produced in court, on February 5, 1993 attorney Robert LeBell, counsel for Saul Ornelas was finally permitted access to the car. The government had canceled an earlier request. As stated in Ismael Ormelas Ledesma's Brief in Support of Motion to Suppress Statements and Items Seized from the Automobile, dated February 6, 1993, Mr. LeBell "was able to examine the car's interior, the area in question felt the same as the equivalent area on the driver's side and felt no different that he would expect it to feel given the composition of the material.

"If the government asserts that probable cause exists to search the interior of the car's body based on this earlier testimony of detective Luedke, this counsel would request the government produce the car in the Marshal's garage, which is a part of the federal court house, for the purpose of the magistrate judge and/or his law clerk personally inspecting the alleged "loose" area and again making a record of the findings."

The government's brief of February 9, 1993, at 11, makes the argument that the panel was loose and "this was sufficient probable cause to allow the officer to remove the vent cover to look inside the area."

The magistrate was faced by testimony of Luedke concerning the rusty screw which he knew to be a lie and counsel's assertions that the panel not being loose and an invitation to bring the car to the courthouse. His

credibility determination that "The record discloses no evidence from which Luedke could conclude that a hidden panel contains contraband" has now been rejected by this court.

Given that this court determination that the reasonable suspicion outlined by the alleged drug courier profile only ripened into probable cause to search the interior of car's body by virtue of adopting Luedke's testimony that the panel in question was in fact "loose," both counsel would move that the auto in question be brought to the Marshal's garage and that this court or his law clerk and all parties jointly inspect the car to make a record as to the panel.

All parties had done a similar inspection in the magistrate's chambers concerning the screw, which dramatically changed the court's opinion concerning the detective's credibility. Given Mr. LeBell's assertion concerning his earlier inspection, the interests of justice require such a joint examination for the purpose of establishing a firm record on this critical fact.

Dated at Milwaukee, WI this 11th day of March, 1993.

/s/ Robert G. LeBell
Robert G. LeBell, Counsel for Saul Ornelas
250 E. Wisconsin Ave. Suite 1900
Milwaukee, WI 53203
414-276-1233

/s/ Brian W. Gleason
Brian W. Gleason, Counsel for
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Docket # 48-Transcript of 3-11-93, pages 2-5, Eastern District of Wisconsin.

Title omitted in printing.

TRANSCRIPT OF PROCEEDINGS

[2] THE CLERK: Case No. 92-CR-243, United States versus Saul Ornelas. Called for a change of plea. May I have the appearances, please?

MS. FLEMING: Good afternoon, Your Honor. Penelope Fleming, Assistant United States Attorney, appearing on behalf of the Government. Also seated at counsel table is Lisa Cichocki from Probation and Parole.

MR. LEBELL: Good afternoon, Judge. Attorney Robert LeBell appearing on behalf of Saul Ornelas, and also Connie Ward is here as a translator.

THE COURT: Okay. We will swear the interpreter.

(Whereupon the Interpreter, Connie Ward, was sworn in.)

THE COURT: Okay. This case is here as is the case of the co-defendant after this case, at 3 o'clock, for purposes of taking of a plea pursuant to Plea Agreement reached before the Court came out; however, it was served and I take it the Government was served with a motion for reconsideration. It's titled Motion for Reconsideration and Inspection of Automobile. Has the Government been served?

MS. FLEMING: Your Honor, I have – I received a copy a few minutes ago.

THE COURT: All right. And the motion request [3] that the court reconsider what it decided in the review de novo, review of the Magistrate's decision relative to a variety of motions that were filed and heard prior to their appearance and the Court summarily affirmed the Magistrate's recommendations relative to the finding of reasonable suspicion for a temporary stop, the finding of consent for the vehicle search, the denial of Defendant's motion to suppress or post arrest statement, and the question upon which the reconsideration is based is the one involving whether the cocaine seized from the Defendant's vehicle would or should have been suppressed as a resuit of invalid search.

The Court conducted its analysis and in that analysis did not reject the Magistrate's holding regarding the fact that, through the doctrine of inevitable discovery, that the cocaine in question – that which was seized – would have been discovered in any event, but went on to find that based on the totality of the circumstances and its reasoning outlined in its decision, that the search could be validated and was validated on other considerations.

Motion for reconsideration is one which highlights the fact that the – this Court in its de novo review relied upon the testimony of Officer Luedtke who said at one point that he felt – physically felt a loose panel. And that the argument is that Judge Bittner in ruling on officer Luedtke's testimony found that there was nothing in the [4] records – and this was at page fifteen of Magistrate Bittner's ruling and page five of the Court's ruling – where the Magistrate said that there was no probable cause to search because "the records disclosed no evidence from which Luedtke could conclude that a hidden

panel contained contraband." The Court is asked that its decision based upon Luedtke's testimony and factoring that into the totality of the circumstances is one which should be reversed because it disregards Magistrate Bittner's findings. The Court doesn't deem it to be that. The the Court finds that it can and did rely upon what Officer Luedtke stated. The fact that there has been a request in this motion for reconsideration for an inspection of the automobile by the Court and counsels – Mr. LeBell having done so and found that his inspection disclosed that there wasn't the loose panel, or that none of the panels – or that the particular panel, the specific panel, that was testified to by Officer Luedtke as being loose was not loose and not apparently somewhat loose upon being physically felt. That examination the Court finds is not necessary because regardless of what the Court would find at the – any subsequent inspection, the fact of the matter is that the records reviewed by the Court and testimony of Officer Luedtke is one which discloses that in his estimation and his opinion and by his calculation and his view and his belief when – as he testified he felt the panel or observed the panel and engaged the panel, that it appeared, [5] quote, to be – or didn't appear but physically felt like it was somewhat loose, close quote.

In addition, – so the Court's not going to reconsider its judgment. It's put that on the record as an explanation as to why, one, but two, the Court in its decision and order indicated that it was sustaining as it indicated on page three of its decision and order – that it does not reject the Magistrate's holding regarding the inevitable discovery but finds that holding unnecessary in view of the Court's belief as just indicated. And the Court in a

footnote to that decision I think explains thoroughly and carefully the reason why it's not going to disturb that. That fact that that holding – the fact that the Court found it unnecessary in view of its other decision certainly finds that there is a basis for this case to proceed at this juncture on the guilty pleas. So for those reasons we will proceed to the taking of the guilty pleas.

Now, in that connection, the Court has a Plea Agreement which was signed by Mr. Ornelas, Mr. LeBell, Mr. Fryatt, the U.S. Attorney, and Miss Fleming. And the Court will have Mr. Ornelas sworn at this time. Mr. Ornelas, would you please raise your right hand?

THE DEFENDANT: Yes.

SAUL ORNELAS, having been first duly sworn, on oath testified as follows:

THE COURT: Now, Mr. Ornelas, you have been

• • •

UNITED STATES DISTRICT COURT

Eastern District of Wisconsin

(Filed May 21, 1993)

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
vs.	(For Offenses Committed On or After November 1, 1987)
ISMAEL ORNELAS-LEDESMA	Case Number: 92-CR-243 Brian W. Gleason Defendant's Attorney
	Penelope C. Fleming Assistant U.S. Attorney

THE DEFENDANT:

[x] pleaded guilty to count one

[ ] was found guilty on count(s) _ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 841(a)(1) 18 U.S.C. § 2	possession with intent to distribute cocaine	December 11, 1992	1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count _ is dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $ 50.00 for count One which shall be due [ ] immediately [x] as follows: prior to the expiration of this sentence

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for the district within 30 days of any change of name, residence, or mailing address until all fines restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
612-46-6929 & 564-77-1676

Defendant's Date of Birth:
October 14, 1968

Defendant's Mailing Address:

Racine County Jail
717 Wisconsin Avenue
Racine, WI 53403

Defendant's Residence Address:

May 20, 1993
Date of Imposition of Sentence

/s/ Rudolph T. Randa
Signature of Judicial Officer

Hon. Rudolph T. Randa
U.S. District Judge
Name & Title of Judicial Officer

5/21/93
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months.

[x] The court makes the following recommendations to the Bureau of Prisons: that the defendant serve his sentence at a facility near San Jose, California

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ____ a.m. p.m. on _____
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____
[ ] as notified by the United States Marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____
_____
_____
_____

Defendant delivered on ____ to _____ at _____, with a certified copy this judgment.

_____
United States Marshal

By _____
Deputy Marshal

* * *

_____

UNITED STATES DISTRICT COURT

Eastern District of Wisconsin

(Filed Jun. 11, 1993)

UNITED STATES OF AMERICA

vs.

SAUL ORNELAS

AMENDED

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: 92-CR-243

Robert G. LeBell
Defendant's Attorney

Penelope C. Fleming
Assistant U.S. Attorney

THE DEFENDANT:

[x] pleaded guilty to count one

[ ] was found guilty on count(s) _ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 841(a)(1) 18 U.S.C. § 2	possession with intent to distribute cocaine	December 11, 1992	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count _ is dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $ 50.00 for count One which shall be due [ ] immediately [x] as follows: prior to the expiration of this sentence

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for the district within 30 days of any change of name, residence, or mailing address until all fines restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 393-02-2916

Defendant's Date of Birth: June 28, 1968

Defendant's Mailing Address:

Defendant's Residence Address:

44124 Begonia Street
Lancaster, California

May 28, 1993
Date of Imposition of Sentence

/s/ Rudolph T. Randa
Signature of Judicial Officer

Hon. Rudolph T. Randa
U.S. District Judge
Name & Title of Judicial Officer

6/11/93
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prison to be imprisoned for a term of 63 months.

[x] The court makes the following recommendations to the Bureau of Prisons: that the defendant serve his sentence at Lompoc, California

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ___ a.m. p.m. on _____
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____
[ ] as notified by the United States Marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on ____ to _____ at _____, with a certified copy this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of four (4) years .

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[x] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[x] The defendant shall not possess a firearm or destructive device.

[x] Pursuant to the Anti-Drug Abuse Act of 1988, the defendant shall not illegally possess any controlled substance. Such possession will result in revocation of the supervised release term and the defendant shall serve one-third of the term of supervised release in prison.

[x] The defendant is to cooperate with the Immigration and Naturalization Service at the direction of the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

* * *

STATEMENT OF REASONS

[x] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 24

Criminal History Category: 1

Imprisonment Range: 51 to 63 months

Supervised Release Range: 4 to 5 years

Fine Range: $ 12,500.00 to $ 1,000,000.00

[x] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[x] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reasons:

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ismael ORNELAS-LEDESMA and Saul Ornelas,
Defendants-Appellants.

Nos. 93-2356, 93-2405.

United States Court of Appeals,
Seventh Circuit.

Argued Dec. 10, 1993.

Decided Feb. 10, 1994.

Before POSNER, Chief Judge, and FLAUM and MANION, Circuit Judges.

POSNER, Chief Judge.

Ismael Ornelas-Ledesma and Saul Ornelas were convicted of illegal possession of a controlled substance with intent to distribute it and were sentenced to 60 and 63 months in prison, respectively. The appeal challenges the denial of their motion to exclude from evidence the cocaine seized from "their" 1981 Oldsmobile. We say "their" Oldsmobile, although it was registered to someone else, because the government does not question their right, akin to that of a tenant, bailee, borrower, or other lawful occupier or possessor, to object to the seizure. The cases are quicker to draw the analogy in the case of the driver of a vehicle, *United States v. Garcia*, 897 F.2d 1413, 1418-19 (7th Cir.1990); *United States v. Soto*, 988 F.2d 1548, 1553 (10th Cir.1993); *United States v. Miller*, 821 F.2d 546, 548-49 (11th Cir.1987), than in the case of a passenger, *Rakas v. Illinois*, 439 U.S. 128, 148-49, 99 S.Ct. 421, 433, 58 L.Ed.2d 387 (1978); *United States v. Lechuga*, 925 F.2d 1035,

1037, 1041 n. 3 (7th Cir.1991); *United States v. Roberson*, 6 F.3d 1088, 1091 (5th Cir.1993), but the government does not ask us to make that distinction here.

The defendants argue that the stop which led to their consenting to the search of the car violated the Fourth Amendment, invalidating the consent and hence the search; and that independently of this the seizure of the drugs, which was from the inside of the door of the car, violated the Fourth Amendment because, even if a superficial search of the car was proper as an incident of the stop, the officers needed and lacked probable cause to open the compartment and seize its contents.

Police officers in Milwaukee keep a regular watch on motels, looking for drug runners. Cruising through a motel parking lot one day in 1992, a detective named Pautz, a two-year veteran of the Milwaukee County Sheriff's Drug Enforcement Unit, spotted a 1981 two-door Oldsmobile with a California license plate. Pautz was interested. Two-door General Motors cars of that vintage are believed by law enforcement authorities to be drug traffickers' favorites (though not their only favorites, *United States v. Sharpe*, 470 U.S. 675, 682 n. 3, 105 S.Ct. 1568, 1573 n. 3, 84 L.Ed.2d 605 (1985); *United States v. Ocampo*, 890 F.2d 1363, 1366 (7th Cir.1989)) because it is easy to conceal drugs in them. And California, like other states on the eastern, western, and southern borders of the United States, is a state from which drugs are shipped to other states, a "source" state. So Pautz called up his dispatcher on his car radio and asked him to find out whom the car was registered to. Now in fact it was registered to "Ornelas, Miguel Ledesma," of San Jose, California, who may or may not be related to one of the

defendants. But we do not know what exactly the dispatcher told Pautz or what exactly Pautz understood – whether it was "Miguel Ledesma Ornelas" or "Miguel Ornelas Ledesma." Confusion on this score is understandable, though not justifiable. Spanish naming conventions are confusing to non-Hispanic Americans. When a Hispanic has two surnames, such as Ornelas Ledesma or Ledesma Ornelas, the first is his father's last name and the second his mother's maiden name. The first is primary, and the second subordinate – exactly the reverse of the middle and last names of non-Hispanics. To a Hispanic, therefore, "Ornelas, Miguel Ledesma," would denote Miguel Ornelas Ledesma rather than, as a non-Hispanic would expect, Miguel Ledesma Ornelas. But if the motor vehicle authorities, the dispatcher, or Pautz were unfamiliar with Spanish naming conventions (and Pautz testified that he *was* unfamiliar with them), "Ledesma" and "Ornelas" could easily get reversed.

Pautz, believing that he had the name of the car's registered owner, entered the motel and checked the registry, which showed that an Ismael (not Miguel) Ornelas had registered at 4:00 a.m. and had been accompanied by another man. Pautz then called his partner, Detective Hurrle, to join him. When Hurrle arrived, the two officers called the Milwaukee office of the Drug Enforcement Administration and asked it to run a NADDIS check on Miguel Ledesma Ornelas from San Jose and on Ismael Ornelas. NADDIS (Narcotic and Dangerous Drug Information System) is a computerized compilation of the federal Drug Enforcement Administration's information on known and suspected drug traffickers. NADDIS reported two "hits." One was on Miguel Ledesma

Ornelas, also known as Miguel Lemus-Ledesma, identified by NADDIS as a heroin dealer in El Centro, California, which is hundreds of miles from San Jose, the residence of the registered owner of the car. The other "hit" was on Ismael Ornelas, Jr., of Tucson, Arizona, reported by the computer to be a 1000-kilogram-per-month cocaine dealer, although no "wants" or warrants were outstanding against him. The officers did not attempt to obtain descriptions of the two suspected dealers, neither of whom in fact is one of or, as far as we know, related to the defendants.

Because the car was an older GM two-door, because its occupants had checked in at the motel at 4:00 a.m. without having made reservations in advance, because there were two persons rather than just one and at least one of them was Hispanic, and because they apparently had come from a "source state" – and of course because of the "hits" on similar or identical names – the officers decided to stop and question the men when they left the motel. At this point a third officer arrived, Luedke, bringing with him a drug-sniffing dog; and Pautz left. After a time, two men emerged from the motel and entered the Oldsmobile. The officers parked their cars on either side of it. Hurrle tapped the window on the driver's side, identified himself as a police officer, and asked both men for identification. Saul Ornelas, who was in the driver's seat, produced a driver's license in that name; Ismael Ornelas-Ledesma, who was in the front passenger's seat, produced a driver's license in the name of Ismael Ornelas, residing in Martinez, California. Hurrle asked whether there were any drugs in the car. The occupants said "no." Hurrle asked them for permission to search the

car, and they gave their permission. The two men were not placed under arrest but the government concedes that a reasonable person in their position would not have felt free to leave. So the encounter was a so-called "*Terry* stop" (after *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)), *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988); *INS v. Delgado*, 466 U.S. 210, 216, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984); *United States v. Adebayo*, 985 F.2d 1333, 1338-39 (7th Cir.1993), a semi-arrest that is lawful under the Fourth Amendment if but only if the officers had a "reasonable suspicion supported by articulable facts" that the persons stopped were engaged in criminal activity. *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989).

Officer Luedke inspected the interior without canine assistance and noticed a loose panel on the passenger's door. One of the screws by which the panel was fastened to the door was – Luedke testified – rusty. To him this meant that it had been removed recently. He didn't explain why, but maybe the idea is that the removal of the screw would have scraped off its chrome coating, which protected it from rusting. Suspecting that drugs were concealed behind the panel, Luedke pried it open. His hunch was correct; there was a package containing two kilograms of cocaine wrapped in aluminum foil and paper. Ornelas and Ornelas-Ledesma were then arrested.

Clearly, were it not for the NADDIS hits, the officers would not have had grounds for *reasonable* suspicion that the defendants were drug traffickers. Not only is every circumstance on which the officers relied other than the

hits innocent taken by itself – many Americans (approximately one in eight) are Californians, many Californians are Hispanic, many Americans drive two-door General Motors cars, many people check into motels very late at night (or early in the morning), many travel in pairs rather than alone, and many do not make advance reservations – but the confluence of these circumstances is pretty innocuous as well, especially since many of the circumstances are correlated rather than independent. Hispanics are disproportionately concentrated in California, and having on average lower incomes than non-Hispanic Americans are doubtless more likely than other Americans to drive two-door rather than four-door cars, older rather than newer cars, and American rather than foreign cars. They are more likely to drive than to fly and, we imagine, less likely to make reservations in advance at motels, since cheap motels don't advertise much or have 800 numbers. Nothing is more common than for people taking long trips to drive until they're tired and then – often at very odd hours – to check in at the nearest motel, of course without a reservation. And people who drive long distances late at night prefer to have someone with them. Because the "suspicious" circumstances (other than the NADDIS hits) are so strongly correlated with each other, were they considered sufficient by themselves to justify a stop the practical consequence would be that a very large proportion of all Hispanic Americans would be vulnerable to being stopped on suspicion of drug trafficking. Hispanics would be second-class citizens in the eyes of the police. Although a brief investigatory stop is less intrusive than an arrest, it is sufficiently redolent of

police-state tactics for courts to insist in the name of the Fourth Amendment that its use be circumscribed.

So we must ask what the NADDIS hits added to a "drug courier profile" that seems only a little better than a dragnet for Hispanics. It would be nice to *know* something about NADDIS, but the government successfully opposed the defendants' efforts to obtain discovery aimed at determining the character and reliability of the information in the NADDIS data base, and as a result the record is bare of evidence about it. At argument the government's lawyer, while saying that she has used NADDIS herself, disclaimed any knowledge about the system except how to access it. We do not know how many names are in it currently, where exactly the names come from, whether any of the information inputted into the system is screened for reliability before being entered, whether anyone checks to make sure that errors are not made in inputting information, whether information is updated systematically, and (a closely related question) whether information discovered to be stale or inaccurate is removed from the system. Although a number of judicial opinions mention NADDIS in passing – obviously it is widely used in drug enforcement – we have found no considered judicial assessment of its reliability, although we have found occasional judicial expressions of concern about that reliability. *United States v. $7,850 United States Currency*, 7 F.3d 1355, 1358 (8th Cir.1993); *United States v. $215,300 United States Currency*, 882 F.2d 417, 419 and n. 2 (9th Cir.1989) (per curiam); *United States v. Saperstein*, 723 F.2d 1221, 1232 (6th Cir.1983).

Maybe NADDIS is no better than a vast compendium of rumors, errors, and libels: garbage in, garbage out.

That seems unlikely. It would not be heavily used by drug enforcement authorities if it were merely a random sample of the American population. Which is not to say, however, that it is *highly* reliable; concern that it may not be is heightened by the (scanty) secondary literature, which depicts NADDIS as an unselective, unweeded repository of unsubstantiated allegations, often dated. See UPI Release, "VIP Names in Drug Agency's Computer Files," July 3, 1984; Vanessa Jo Grimm, "Behemoth DEA Database Tracks Drug Smugglers," *Government Computer News*, July 8, 1991, p. 85. According to the UPI Release, as of 1984 NADDIS contained 1.5 million names, obtained from debriefings of informants and suspects and from surveillance and intelligence reports of various law enforcement agencies.

As an example of NADDIS's possible unreliability, we note that according to it Ismael Ornelas, Jr., of Tucson, a 1000 kilogram a month dealer – a *large* dealer – is not wanted by any law enforcement authority in the country. Maybe *that* Ornelas (who is neither Saul Ornelas nor Ismael Ornelas-Ledesma nor the registered owner of the Olds) died years ago or is some practical joker's or desperate informant's fictional creation or is an honest man falsely accused by an enemy. Because the reliability of information stored in NADDIS is unknown, that information must, on the record before us, be reckoned no more reliable than that of an informant not known to be reliable. Therefore, since an uncorroborated tip from such an informant cannot by itself furnish probable cause for an arrest or search, *Illinois v. Gates*, 462 U.S. 213, 227, 103 S.Ct. 2317, 2326, 76 L.Ed.2d 527 (1983), an unverified, uncorroborated entry in NADDIS cannot do so either.

United States v. $7,850 United States Currency, supra, 7 F.3d at 1358; *United States v. $215,300 United States Currency, supra*, 882 F.2d at 419 and n. 2; *United States v. Saperstein, supra*, 723 F.2d at 1232. The issue here, it is true, is not probable cause, but reasonable suspicion, because we are dealing with a stop rather than an arrest. But the Supreme Court has held that an uncorroborated anonymous tip, even when it comes from law enforcement authorities, does not by itself justify a stop. *United States v. Hensley*, 469 U.S. 221, 232, 105 S.Ct. 675, 682, 83 L.Ed.2d 604 (1985). The statement in *United States v. Troka*, 987 F.2d 472, 474 (7th Cir.1993), that "the police department was a reliable source," must be understood in context (the police department was a reliable source *in the circumstances of that case*), rather than as a quixotic effort to overrule the Supreme Court.

That cannot be the end of our analysis, however. NADDIS furnished two tips, not one. "Ismael Ornelas," the name on the motel registry, was very similar to "Ismael Ornelas, Jr.," the name in NADDIS. And while the names Miguel Ornelas Ledesma and Miguel Ledesma Ornelas are as different from each other as Francis Scott Key and Francis Key Scott, the names could easily have been reversed in entering them in the computer, just as "Jr." could easily have been left off a motel registry. So there was some reason to believe that the registered owner of the Olds was the Miguel Ornelas Ledesma, or Miguel Ledesma Ornelas, identified by NADDIS as a suspected drug dealer. Even if NADDIS is not terribly reliable, some or for that matter many entries in it may be accurate or at least approximately so. And the fact that *both* the registered owner of the car *and* the name on the

motel registry corresponded more or less to names of suspected drug dealers in the NADDIS database was impressive. One "hit" might well be coincidence; it was much less likely that two – one corresponding to the name in the hotel registry, presumably that of either the driver or the passenger; the other to the name of the registered owner, who might or might not be one of the two men in the motel – were, though this depends in part on how common the names "Ornelas" and "Ledesma" are. Paradoxically, the very unreliability of NADDIS (if it is unreliable) might strengthen the inference that the two men in the Olds were involved in the drug trade; inverting last and middle names is just the kind of mistake that one would expect in a carelessly maintained database. A mistaken premise can furnish grounds for a *Terry* stop, if the officers do not know that it is mistaken and are reasonable in acting upon it. *Illinois v. Rodriguez*, 497 U.S. 177, 184-86, 110 S.Ct. 2793, 2799-2800, 111 L.Ed.2d 148 (1990); *United States v. De Leon-Reyna*, 930 F.2d 396, 399 (5th Cir.1991) (en banc) (per curiam); *United States v. Walraven*, 892 F.2d 972, 974-75 (10th Cir.1989).

The tips were mutually corroborating; and the other circumstances on which the officers relied (the make and type of the car, the state it came from, etc), insufficient as they were by themselves to create a suspicion reasonable enough, substantial enough, to justify the infringement of personal liberty that is brought about by an investigative stop, may, when taken together with the NADDIS "tips," have tipped the balance in favor of a finding of reasonable suspicion. *United States v. Esieke*, 940 F.2d 29, 34 (2d Cir.1991), and *United States v. Morin*, 665 F.2d 765 (5th Cir.1982), factually similar cases although stronger for the

government, so suggest. And the Supreme Court held in *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), that an anonymous tip can create reasonable suspicion if corroborated. The form the corroboration took in that case was verification of a prediction made by the informer, but there is no magic in a particular form of corroboration. The circumstances that first aroused Pautz's suspicions were corroborative of the "anonymous tips" furnished by NADDIS in the sense that they made it likelier than otherwise that NADDIS was, in this instance anyway, accurate. Standing alone, the drug courier profile that first aroused Pautz's suspicions was very little. Standing alone, one NADDIS "hit" could not, in the absence of any evaluation of NADDIS's reliability, be thought much either. The second "hit," however, added to the credibility of the first; and together the profile and the "hits," though still not enough evidence of crime to furnish probable cause to search the car, could satisfy the lesser showing required for a *Terry* stop.

Although the question is close, we conclude that the district court did not commit clear error in holding that there was a lawful stop. And clear error is the test; the proposition that review of a district court's determination of reasonable suspicion (if it is a *Terry* stop) or probable cause (if it is an arrest, search, or seizure) is plenary, embraced in such cases as *United States v. Jaramillo*, 891 F.2d 620, 626 (7th Cir.1989), is no longer tenable after *United States v. Spears*, 965 F.2d 262 (7th Cir.1992), where, overruling inconsistent precedents, this court held that the standard for judicial review of determinations of probable cause was clear error. There is no basis for distinguishing in this regard between probable cause and

reasonable suspicion. They are adjacent points on a continuum.

Since the stop was lawful, we need not decide whether, had it been unlawful, the defendants' consent to search would nevertheless have been valid even though (a relevant factor, though not a decisive one, *Schneckloth v. Bustamonte*, 412 U.S. 218, 231-33, 249, 93 S.Ct. 2041, 2049-51, 2059, 36 L.Ed.2d 854 (1973)) the officers failed to advise the defendants of their right not to consent. *United States v. Valdez*, 931 F.2d 1448, 1451 (11th Cir.1991); *United States v. Valencia*, 913 F.2d 378, 381 (7th Cir.1990). But we do not think the denial of the motion to suppress the drugs seized from the door of the Olds can be upheld on the basis of the record compiled in the district court. The government does not argue that a *Terry* stop justifies so intrusive a search. The only lawful purpose of a search incident to a *Terry* stop is to protect the officers from the danger that the persons they have stopped will reach for a weapon, *Minnesota v. Dickerson*, ___ U.S. ___, ___, 113 S.Ct. 2130, 2136, 124 L.Ed.2d 334 (1993); *Michigan v. Long*, 463 U.S. 1032, 1049-51, 103 S.Ct. 3469, 3481-82, 77 L.Ed.2d 1201 (1983), and ordinarily and here the officers do not have to dismantle a car to satisfy themselves on that score. Nor does the government argue that the consent to search that *Ornelas* and *Ornelas-Ledesma* gave the officers was consent to dismantle the car. *United States v. Garcia*, *supra*, 897 F.2d at 1419-20; but *cf. United States v. Pena*, 920 F.2d 1509, 1515 (10th Cir.1990). The seizure was lawful, therefore, only if the search yielded information that gave Officer Luedke probable cause to believe that contraband was secreted behind the loose panel. If so, no search warrant was required, even for a search that would

require taking the car apart. *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

In arguing that there was probable cause for the search that discovered the drugs secreted in the car door, the government places great weight on the loose panel and the rusty screw. But the screw was not rusty. The magistrate judge to whom the motion to suppress was referred for a recommended ruling looked at the screw and found no indication of rust. The screw is in the appellate record and we have looked at it ourselves. There is not the slightest trace of rust or of anything that looks like rust. It is a Phillips screw and the head contains scratches that suggest it might have been removed and reinserted, but Luedke was adamant that it was signs of rust that caused him to believe that the panel had been removed recently and then put back in place. Having inspected the screw, the magistrate judge naturally disbelieved Luedke's testimony that the screw had looked rusty. Without discussing the bearing of Luedke's testimony about the loose panel on the issue of probable cause, the magistrate judge concluded that the seizure of the drugs had not been supported by probable cause. But noting the presence of the drug-sniffing dog, he found that the drugs would have been discovered anyway and therefore upheld the seizure on the ground of inevitable discovery. *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

The district judge upheld the seizure, too, but not on the magistrate judge's ground but rather on the ground that the allegedly loose panel alone, which the magistrate judge had not discussed, furnished probable cause. The government defends Luedke's testimony about the rust

by arguing that it was dark inside the car (though it was broad daylight) and maybe the screw looked rusty though it wasn't; we are more accustomed to being told of the remarkable eyesight of the police that enables them to see tiny objects at great distances in the dark. *United States v. Sophie*, 900 F.2d 1064, 1073 (7th Cir.1990); *United States v. Gilliard*, 847 F.2d 21, 24 (1st Cir.1988); *cf. United States v. Pinto-Mejia*, 720 F.2d 248, 262 (2d Cir.1983). In any event, the magistrate judge was not required to believe Luedke or recast his testimony in a believable form.

The magistrate judge concluded that Luedke did not have probable cause to seize the drugs; the district judge concluded that he did. Can we uphold the district judge's determination, in view of this disagreement? The standard for judicial review of a determination of probable cause is, as we have noted already, clear error; and this is so whether the determination is made by a magistrate judge or by a district judge. *United States v. Spears, supra; United States v. Adebayo*, 985 F.2d 1333, 1337 n. 2 (7th Cir.1993). A qualification is necessary, however, for the case in which the magistrate judge, rather than determining probable cause en route to issuing a warrant later challenged by a motion to suppress evidence seized pursuant to it, is merely recommending the disposition of a motion referred to him by a district judge to suppress evidence obtained as a result of a search, or an arrest, made without a warrant. In the first case, the relation between district judge and magistrate judge is that of reviewing court to court of first instance, and the usual standard of appellate review of findings of fact and of the application of a legal standard to such findings applies.

In the second case – which is our case – not only may the district judge (with inapplicable exceptions) "accept, reject, or modify, in whole or in part, the [magistrate judge's] findings or recommendations," 28 U.S.C. § 636(b)(1); he is required "to make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made." *Id.*

The question whether the district judge's power of de novo determination authorizes him to reject a magistrate judge's finding of credibility, without the district judge's hearing the witness himself, was left open in *United States v. Raddatz*, 447 U.S. 667, 681 n. 7, 100 S.Ct. 2406, 2415, 65 L.Ed.2d 424 (1980), though with a broad hint, picked up in *Proffitt v. Wainwright*, 685 F.2d 1227, 1237, 1241 (11th Cir.1982), that the answer is "no." See also *Grassia v. Scully*, 892 F.2d 16, 19-20 (2d Cir.1989); but cf. *LoConte v. Dugger*, 847 F.2d 745, 750 (11th Cir.1988). We need not answer the question here. Rather than reject the magistrate judge's finding that Luedke's testimony about the rusty screw should not be believed, the district judge found probable cause for the seizure in a part of Luedke's testimony that the magistrate judge had not relied upon – the testimony that the panel was loose. A number of cases, illustrated by *United States v. Lugo*, 978 F.2d 631, 637 (10th Cir.1992), treat a loose door panel as a telltale sign of drug running – but not as sufficient in itself to constitute probable cause. (In *United States v. Garcia, supra*, 897 F.2d at 1416, the officers saw packages peeping out from behind the loose panel.) The facts of this case show why. The car was eleven years old when Officer Luedke conducted the search. We mean no disrespect to

Detroit in observing that the interior of a 1981 Olds unlike that of a Rolls Royce is apt to be rather worn and battered after eleven years. The fact that a door panel is loose does not by itself create a reasonable likelihood that the panel conceals a secret compartment containing contraband. *State v. Swanson*, 172 Ariz. 579, 838 P.2d 1340, 1345-48 (App.1992). Here as in most cases there was more, but not much more: mainly the NADDIS "hits" of unproven reliability.

We need not decide, however, whether the NADDIS hits (remember that there were two, and that this enhances their reliability), plus the fact that the defendants fit the drug courier profile, plus a loose door panel add up to probable cause – whether in other words the loose panel could turn reasonable suspicion into probable cause. For we do not know whether Luedke's testimony about the door panel should be believed. The only judicial officer who heard him testify was the magistrate judge, who failed to indicate whether he believed the testimony. Since the magistrate judge disbelieved a closely related part of Luedke's testimony, and the district judge did not overturn *that* credibility finding, it can hardly be *assumed* that the magistrate judge would surely have believed Luedke's testimony about the door panel, or that if he had disbelieved it would surely have been reversed by the district judge. Nor did the latter base his determination on a viewing of the car; there was no viewing. Even if, contrary to *Proffitt*, and to decisions involving the parallel case of administrative review of administrative law judges' credibility determinations, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 495-97, 71 S.Ct. 456, 468-469, 95 L.Ed. 456 (1951); *NLRB v. Augusta*

Bakery Corp., 957 F.2d 1467, 1475-76 (7th Cir.1992); *Ortiz-Salas v. INS*, 992 F.2d 105, 108 (7th Cir.1993), a district judge can reject a magistrate judge's determinations of credibility without hearing the witnesses' testimony himself, we do not think that he can be permitted to ignore the issue of credibility altogether. We do not think that he can accept challenged testimony given before another judicial officer without giving a reason for resolving the issue himself rather than referring the matter for initial determination by the other officer.

This oversight would be academic if the magistrate judge's alternative ground for upholding the seizure – inevitable discovery by Luedke's dog – was so clearly correct that we could uphold it without the benefit of the district judge's views, as in *United States v. Lewis*, 621 F.2d 1382, 1387 (5th Cir.1980). We cannot. No evidence was presented concerning the dog's capabilities. For all we know he is an infallible sniffer of two kilograms of cocaine wrapped and hidden behind the door panel of a car; but we cannot take judicial notice of this fact. We don't know and have not been told anything about this dog except his name (Merlin), although our own research reveals that a Milwaukee drug-sniffing dog named Merlin, presumably the same beast, has on at least one occasion detected drugs in a piece of luggage when there weren't any. *Schaefer v. United States*, 656 F.Supp. 631, 632 (E.D.Wis.1987). If Merlin is *that* good, no doubt he could sniff the cocaine in the door of the defendants' car, but the government has not had the audacity to argue that a dog who can detect nonexistent drugs is an infallible inevitable discoverer of existent drugs. We may be too hard on Merlin; maybe he sniffed the residue of drugs in

the luggage in the *Schaefer* case; maybe it was a different dog with the same name. But the government in its brief, without going so far to confess error on the magistrate judge's alternative ground (that is, inevitable discovery), does not defend it, even though defendant Ornelas had attacked it at some length in his opening brief. The government does not, for example, respond to Ornelas's damaging quotation from the testimony of Detective Hurrle: "I don't know if he [the dog] necessarily would have hit on this particular cocaine." (To which it can be added that we don't know whether the dog would have been directed to sniff in or about the car if Luedke's search had disclosed no suspicious circumstances.) We cannot affirm on a ground that has been waived, *Crane v. Indiana High School Athletic Ass'n*, 975 F.2d 1315, 1319 (7th Cir.1992); *Frederick v. Marquette Nat'l Bank*, 911 F.2d 1, 2 (7th Cir.1990), and the government has waived the defense of inevitable discovery by failing to defend the magistrate judge's determination. Perhaps it did this because it believed that the determination could not be defended. It put all its eggs in the probable-cause basket, and the eggs are broken.

The motion to suppress should not have been denied, though it is open to the government on remand to ask the district judge either to hear Luedke's testimony on the loose panel himself (or at least view the car's interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first

aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel. The court may wish to consider the evidence of the loose panel (if that evidence is believed) in conjunction with the Philips screw. For while it is plain that it is not rusty, it does look as if it had been scratched in just the way one would expect if it had been removed and reinserted, though its appearance could we suppose reflect its removal by Officer Luedke or other handling since. The test for probable cause is objective. It is not what the officer in question actually believed but what a reasonable officer in his position would have believed. *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978); *Mahoney v. Kesery*, 976 F.2d 1054, 1057-58 (7th Cir.1992). A reasonable officer would not have believed the screw rusty but might have believed it showed (other) evidence of having been removed and reinserted. That is a matter to be explored on remand.

The judgments of conviction are vacated and the case is remanded for further proceedings consistent with this opinion. The other grounds raised by the appellants have too little merit to warrant discussion.

VACATED AND REMANDED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

-vs- **Case No. 92-CR-243**

ISMAEL ORNELAS-LEDESMA and SAUL ORNELAS,

Defendants.

ORDER

(Filed Mar. 15, 1994)

This matter comes before the Court on defendants' joint request for a status conference to determine the procedure on remand. The Court sees little reason for a status conference. The 7th Circuit issued clear instructions in this regard:

> The motion to suppress should not have been denied, though it is open to the government on remand to ask the district judge either to hear Luedtke's testimony on the loose panel himself (or at least view the car interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedtke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel.

United States of America v. Ismael Ornelas-Ledesma, et. al., Slip Opinion at 15 in Nos. 93-2356, 93-2405, dated February 10, 1994 (7th Cir. 1994). Defense counsel has indicated to the Court that the Government is unwilling to settle the matter and intends to proceed. Therefore, consistent with the 7th Circuit's remand order, the matter shall be referred to Magistrate Judge Robert L. Bittner for purposes of determining the credibility of Officer Luedtke's testimony regarding the loose door panel and, if said testimony is found to be credible, for purposes of determining whether that testimony, in conjunction with the NADDIS tips as corroborated by the drug courier profile, established probable cause to search.

Dated at Milwaukee, Wisconsin, this 15th day of March, 1994.

SO ORDERED,

/s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ISMAEL ORNELAS-LEDESMA and SAUL ORNELAS,

Defendants.

Case No. 92-CR-243

MAGISTRATE JUDGE'S POST-REMAND RECOMMENDATION TO THE HONORABLE RUDOLPH T. RANDA RE: DEFENDANTS' MOTIONS TO SUPPRESS

(Filed Mar. 29, 1994)

NATURE OF CASE

On February 12, 1993 this Court issued a recommendation on motions to suppress physical evidence filed by defendants Saul Ornelas and Ismael Ornelas-Ledesma. In addressing the defendants' motions to suppress, this court concluded the defendants were lawfully subjected to an investigatory detention based upon reasonable suspicion and clearly consented to a search of the 1981 Oldsmobile. However, this Court further concluded that, under governing case law, the consent did not extend to the door panels and a search of those door panels was not supported by requisite probable cause, because the testimony of Milwaukee County Deputy Sheriff Lyle Luedke, regarding the presence of rust in the groove of the Phillips screw used to attach the vent cover to the door, was not credible. Nonetheless, this Court recommended denial of the defendants' motions to suppress evidence,

since the seizure of cocaine fell within the inevitable discovery exception to the Fourth Amendment exclusionary rule of *Nix v. Williams*, 467 U.S. 431, 433 (1984).

Subsequently, in a March 9, 1993 order, United States District Judge Rudolph T. Randa considered the defendants' objections to the recommendation and ruled the holding regarding inevitable discovery was unnecessary, because the facts found by this Court established probable cause to remove the door panel vent cover and search the compartment behind it. Thereafter, Judge Randa accepted conditional pleas of guilty, pursuant to Fed. R. Crim. 11(a)(2), from the defendants who then appealed the adverse suppression decision.

The Court of Appeals for the Seventh Circuit issued a decision in the matter on February 10, 1994 vacating the defendants' judgments of conviction and remanding the case for further proceedings consistent with its opinion which holds:

> The motion to suppress should not have been denied, though it is open to the government on remand to ask the district judge either to hear Luedke's testimony on the loose panel himself (or at least view the car's interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the

> panel. The court may wish to consider the evidence of the loose panel (if that evidence is believed) in conjunction with the Philips screw.

United States v. Ornelas-Ledesma, et al, Nos. 93-2356, 93-2405 (slip op. at 15) (7th Cir. Feb. 10, 1994). On March 15, 1994 Judge Randa, in turn, referred the matter to this Court for further proceedings in accord with the directions of the Court of Appeals.

DISCUSSION AND ANALYSIS

In its recommendation, this Court made the following findings of fact:

> When Hurrle announced he had completed the search of the trunk, with negative results, Luedke proceeded to the passenger area of the vehicle and checked to see whether the back seat was loose. Upon finding it was not, he examined the right rear quarter panel near the handle. *He found this panel to be loose.* Based upon his training, Luedke suspected the panel had been removed and contraband was hidden inside. Luedke testified he then observed the vent area of the door, noticing the presence of rust in the groove of the Phillips screw used to attach the vent cover, which led him to believe the vent cover had recently been removed. Luedke then released the screw, dismantled the vent area of the door, and exposed a cavity approximately five (5) inches high and four (4) inches wide which contained a paper bag in which he felt a hard block.

(Emphasis added.) (February 12, 1993 Recommendation at 6.)

Officer Luedke's testimony as to the screw was found by this Court to be incredible, in light of the undisputable condition of the screw itself. Nonetheless, except for the rule of *Falsus In Uno Falsus Tu Omnibus,* I have no reason not to believe the panel was loose. Thus, I accept as credible Luedke's testimony that the panel was loose. However, the loose panel alone, given the age of the Oldsmobile, is not probative evidence of the fact it necessarily had been recently removed. *See United States v. Ornelas-Ledesma, et al.* Nos. 93-2356, 93-2405, slip op. at 13 (observing the interior of a 1981 Oldsmobile, unlike that of a Rolls Royce, is apt to be rather worn and battered after eleven [11] years).

So what else is there besides the loose panel to establish probable cause that the compartment had recently been opened and contained contraband. Answer: Only the two (2) NADDIS "hits" and the questionable "drug courier" profile consisting of the facts the defendants were Hispanic Californians driving a two-door General Motors car who had checked into a motel very early in the morning, traveled as a pair rather than alone, and had not made advance reservations. *See United States v. Ornelas-Ledesma, et al.* Nos. 93-2356, 93-2405, slip op. at 5 ("confluence of the circumstances is pretty innocuous . . . especially since many of the circumstances are correlated rather than independent"). The NADDIS computer reports showed a "hit" on Miguel Ledesma Ornelas, also known as Miguel Lemus-Ledesma, identified by NADDIS as a heroin dealer in El Centro, California, which is hundreds of miles from San Jose, the residence of the registered owner of the car; and a second "hit" on Ismael Ornelas, Jr., of Tucson, Arizona who was

reported to be a 1,000 kilogram per month cocaine dealer, although no "wants" or warrants were outstanding against him. Thus, the NADDIS reports are so convoluted and mismatched that they are of little probative value in the probable cause determination. Consequently, the only evidence in the probable cause calculus is the loose panel, a weak drug courier profile, and inconclusive MADDIS "hits." There is just not enough evidence for a reasonable law enforcement officer to believe the door compartment contained contraband, as opposed to being a mere sign of an aging General Motors automobile. *See State v. Swanson*, 838 P.2d 1340, 1345-48 [Ariz. App. 1922]) (no probable cause to believe evidence of crime would be found in the space behind door panels; the screws of which appeared to have been tampered with and were loose, where only other facts were defendant became nervous when the officer opened the vehicle door, and supposed "drug courier profile" consisted of facts that defendant and his passenger were traveling east on an interstate highway in a rental car with electronic paging equipment and a cellular phone). Missing are any additional indicia requisite to a finding of probable cause, as noted in the following cases. *See United States v. Lugo*, 978 F.2d 631, 637 (10th Cir. 1992) (suggesting probable cause to search behind door panels may have existed because totality of circumstances suggested the hidden space contained contraband: defendant was armed, traveling interstate, did not have luggage or other articles normally associated with such a trip; displayed noticeable interest in locking his truck after being told by officers not to; had a weapon within easy reach along with a fully loaded clip, and additional ammunition on the floor of the trunk; and there was a

loosened door panel with a creased edge indicating someone had accessed the cavity inside); *United States v. Pena*, 961 F.2d 333, 339 (2nd Cir. 1992) (defendant entitled to evidentiary hearing on whether probable cause existed for search of door panel where facts in addition to those furnishing reasonable suspicion for investigatory detention were "asserted discovery of an empty bag and screwdriver in the back seat of detained automobile"); *United States v. Arango*, 912 F.2d 441, 447 (10th Cir. 1990), *cert. denied*, 499 U.S. 924 (1991) (probable cause for arrest where officers noticed truck bed did not seem right because it was very shallow, after lifting the tailgate corner of a rubber mat covering truck bed, observed that truck bed had apparently been modified; their knocks on truck bed suggested hidden compartment was running beneath the bed; and defendant had inadequate amount of luggage for purported two [2] week vacation); *United States v. Garcia*, 897 F.2d. 1413, 1419 (7th Cir. 1990) (upholding search of door panels when, while conducting consensual visual search, officers noted lack of window cranks and door handles mismatched and ill fitting screws on the door panels, and spotted packages inside the door while looking through the window opening); *United States v. Thomas*, 787 F.Supp. 663, 684 (E.D. Tex. 1992), *aff'd without op.*, 983 F.2d 1062 (5th Cir. 1993) (probable cause to open exterior side panels of vehicle based on drug sniffing dog's strong alert); *Munguia v. State*, 737 S.W.2d 658, 660 (Ark. App. 1987) (marijuana residue on car floor boards and loose fitting door panel warranted reasonable belief additional marijuana would be found in door panel).

In its opinion, the Court of Appeals also suggested the Court might wish to consider the evidence of the loose panel in conjunction with the Phillips screw which, upon examination by the Appellate Court, "looked as if it had been scratched in just the way one would expect if it had been removed and reinserted", though also noting its appearance could "reflect its removal by Officer Luedke or other handling since." *United States v. Ornelas-Ledesma, et al,* Nos. 93-2356, 93-2405, slip op. at 15. However, the parties orally stipulated to resolution of the matter based upon the prior record.

Review of that record discloses Luedke "used a small pocket-type knife to remove the Philips screw from the plastic vent cover" (Tr. 156). Luedke further testified "a closer examination of that screw indicated there was rust in the area of the Philips head of the screw" (Tr. 155-156). When the screw was brought to this Court for examination, it was contained in a film canister which was fitted with cotton (Tr. 423). The record regarding the condition of the screw and the source of any scratches on it which the Court of Appeals observed is inconclusive. Based on the parties' stipulation, this Court has not reexamined the screw and the record is insufficient for this Court to make a determination of when or how the screw was scratched. Consequently, any scratches on the screw have no impact on this Court's determination that there was not probable cause for the search of the door panel.

It may be that, based upon this Court's recommended disposition of the defendants' motions to suppress, Judge Randa may decide the record regarding the scratches on the screw requires further development.

However, due to the fact the defendants, whose appearance would be requisite at a supplemental evidentiary hearing, pursuant to Fed. R. Crim. P. 43(a), are confined in California, necessitating two (2) to three (3) weeks advance notice of an evidentiary hearing in this District so they could be transported here by the United States Marshal, it is impossible for me to conduct such a hearing by reason of my March 31, 1994 retirement from the bench.

In sum, this court finds testimony of Officer Luedke regarding the loose panel is credible, but that testimony combined with the other factors which contributed to reasonable suspicion to stop the defendants, did not establish probable cause to search the door panel.[1] The record regarding the scratches on the screw is inconclusive and does not contribute to this Court's probable cause calculus. Consequently, this Court will recommend that the defendants' motions to suppress physical evidenced be granted.

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[1] In its February 12, 1993 recommendation, this Court also found there was not probable cause for a search of the door panel. However, it recommended the defendant's motions to suppress be denied, based upon its finding that discovery of the cocaine in the door panel fell within the inevitable discovery exception to the exclusionary rule. This finding was not defended on appeal by the government and, consequently, has been waived. *United States v. Ornelas-Ledesma, et al.*, Nos. 93-2356, 93-2405, slip op. at 15.

CONCLUSION

NOW THEREFORE, IT IS HEREBY RECOMMENDED that the United States District Judge enter an order **GRANTING** defendant Saul Ornelas' motion to suppress and exclude physical evidence; and,

IT IS FURTHER RECOMMENDED that the United States District Judge enter an order **GRANTING** that aspect of defendant Ismael Ornelas-Ledesma's motion to suppress items seized from the 1981 Oldsmobile.

Your attention is directed to 28 U.S.C. § 636(b)(1)(B) and (C) and Local Rule 13.03 (E.D. Wis.), whereby written objections to the foregoing recommendation may be filed in duplicate with the Clerk of Court within ten (10) days hereof. Failure to file a timely objection shall result in a waiver to your right to appeal

Dated at Milwaukee, Wisconsin this 29th day of March, 1994.

/s/ Robert L. Bittner
ROBERT L. BITTNER
United States
Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

-vs- **Case No. 92-CR-243**

SAUL ORNELAS and
ISMAEL ORNELAS-LEDESMA,

Defendants.

DECISION AND ORDER

(Filed Sep. 20, 1994)

This matter comes before the Court on remand from the Seventh Circuit for purposes of additional fact-finding and reconsideration of the probable cause issue. The facts of the case, with one addition, are as stated in the initial Magistrate's recommendation dated February 12, 1993, which the Court adopts and incorporates here by this reference.

On February 12, 1993, Magistrate Judge Robert L. Bittner issued a recommendation that defendants' motions to suppress the cocaine at issue be denied. The Magistrate's recommendation was not based on the existence of probable cause. Rather, the Magistrate found that the case fit within the "inevitable discovery" exception to the probable cause requirement. In a decision dated March 9, 1993, this Court upheld the Magistrate's recommendation, but on different grounds. This Court found that the drug courier profile, the two NADDIS hits and

the loose door panel, constituted probable cause to remove the door panel and search for drugs. The defendants entered conditional pleas and appealed the suppression issue. The Seventh Circuit vacated the decision on grounds that this Court incorrectly thought the Magistrate had ruled upon the credibility of Officer Luedtke's testimony concerning the loose door panel. The Circuit Court then gave explicit instructions regarding what was to be done on remand:

> The motion to suppress should not have been denied, though it is open to the government on remand to ask the district judge either to hear Luedtke's testimony on the loose panel himself (or at least view the car interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedtke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel.

United States v. Ornelas-Ledesma, 16 F.3d 714, 721-22 (7th Cir. 1994).

On remand, this Court again referred the matter to the Magistrate for purposes of making an initial determination regarding the credibility of Officer Luedtke's testimony and the existence of probable cause. The Magistrate found Officer Luedtke's testimony regarding the loose door panel credible, and this Court accepts that finding. The Magistrate further found, however, that

adding the loose door panel to the drug courier profile and the two NADDIS hits was not sufficient to establish probable cause. This is contrary to the Court's original conclusion, which found that "reasonable suspicion became probable cause when Officer Luedtke found that the right rear door panel of the car was loose."

The Court acknowledges that the issue is a close one, but weighing the evidence "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement," *see Texas v. Brown*, 460 U.S. 730, 742 (1983), the Court is compelled to reach the same conclusion. Both the Seventh Circuit and the Magistrate raised concerns regarding the broad brush of drug courier profiles, the reliability of the NADDIS system, and the significance of a loose door panel in a 12-year old car from General Motors. Viewed individually, these facts may be unremarkable. They become more meaningful when, in a specific case, they converge and form around two specific individuals. That is what happened here. The question is whether, based on that confluence of facts, Officer Luedtke was reasonable and justified in his belief that drugs lay within the defendants' car door. In answering this question, the law says that Officer Luedtke and his actions are not to be judged in hindsight. This means that his search is not justified by the fact that he was right, it also means that his search is not invalid simply because the names on the two NADDIS hits were not absolutely identical to the names provided, or because the addresses did not match up, or because the other information he relied upon was relatively innocuous when considered alone. The test is one of flexibility and

common sense, requiring only "practical, nontechnical probabilit[ies]". *Id.*

This case strikes the Court as an example of how common sense translates into good and constitutionally valid police work. As the Seventh Circuit noted, "Milwaukee police keep a regular watch on motels, looking for drug runners," *Ornelas-Ledesma*, 16 F.3d at 715. This makes sense, and this is what the officers were doing here when they discovered defendants' older model, two-door GM car with source state license plates. A routine survey thus became a hunch. An examination of the motel registry showed that the car was driven by two men who checked into the motel at 4:00 a.m. without advance reservations. The hunch thus grew stronger.[1] Then a NADDIS check on the registered owner of the vehicle scored a hit on a known or suspected heroin dealer, although the addresses did not match up. The hunch ripened into generalized suspicion. A NADDIS check on the name listed in the motel registry also scored a hit on a prolific cocaine dealer, although the addresses again did not match up and there was a "Jr." designation appended to the name retrieved by NADDIS. Nonetheless, two NADDIS hits on names virtually identical to those uncovered by the officers were too impressive to be coincidental. Generalized suspicion thus became reasonable suspicion directed at two specific individuals. After the

[1] While the Seventh Circuit recognized these facts as "innocent taken by [themselves]," *Ornelas-Ledesma*, 16 F.3d at 716, they do not preclude the officers from developing their intuition.

resulting *Terry*-stop, one of the suspects produced identification containing the name of the NADDIS cocaine dealer. Suspicions were confirmed and reinforced, Officer Luedtke asked for permission to search the vehicle, Consent was given. During a general search of the interior, Officer Luedtke discovered a loose door panel near the right rear seat.

What was Officer Luedtke to do? At this juncture, every additional step turned up additional information which dispelled doubt about the innocent nature of the facts and made the officers' suspicions stronger and more probable. Should Officer Luedtke have stopped at that point simply because a loose door panel on a 12-year old car, considered by itself, is likely to be a common occurrence? Or, does Officer Luedtke view the loose panel as the accumulated evidence directs him to view it, as his experience has told him to view it, and as a number of cases have also viewed it: "[A]s a telltale sign of drug running"? *Id.* at 720.[2] A competent police officer removes the door panel. He removes it because it is the final fact in a string of unbroken facts which establishes the probable cause equation.

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. The Government's objection to the Magistrate's recommendation is sustained and the defendants' motions to suppress are denied.

[2] *See* Magistrate's Recommendation dated February 12, 1993 at 6-7 ("Based upon his training, Luedtke suspected the panel had been removed and contraband was hidden inside).

Dated at Milwaukee, Wisconsin, this 20th day of September, 1994.

SO ORDERED,

/s/ Rudolph Randa
HON. RUDOLPH T, RANDA
U. S. District Judge

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Submitted March 2, 1995

Decided April 18, 1995

Before

Hon. Richard A. Posner, Chief Judge

Hon. Joel M. Flaum, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	**Appeal from the United States District Court for the Eastern District of Wisconsin. No. 92 CR 243 Rudolph T. Randa, *Judge*.**
Nos. 94-3349, 94-3350 **v.** **SAUL ORNELAS, ISMAEL ORNELAS LEDESMA,** *Defendants-Appellants.*	)	

Order

This is a sequel to the decision of this panel in *United States v. Ornelas-Ledesma*, 16 F.3d 714 (7th Cir. 1994), and familiarity with that decision is assumed. Briefly, we held that the district court had erred in denying the defendants' motion to suppress the fruits of a search of their automobile without making a determination of the credibility of Office Luedke's testimony that the panel behind which he found the drugs was loose. We remanded with directions to determine whether the panel was loose; if it was not, to grant the motion; and if it was, to consider

whether the loose panel, in conjunction with other suspicious circumstances discussed in our opinion, established probable cause for the search.

On remand, the district judge referred the issue of Luedke's credibility to the magistrate judge before whom Luedke testified and who had recommended that the motion be granted. Without granting a new hearing, the magistrate judge reported that he believed Luedke had testified truthfully about the loose panel. The district judge then determined that when the loose panel was considered in conjunction with the other circumstances, the search was indeed supported by probable cause.

The defendants appeal. Our review is deferential. The district judge's finding of probable cause may be set aside only if clearly erroneous. We do not find clear error. The district judge's opinion, although brief, adequately reviews the circumstances on which the decision to search the car was based and explains why taken as a totality they gave the officers probable cause to conduct the search. The judgment of the district court must therefore be, and it is,

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITHOUT ORAL ARGUMENT

Date: April 18, 1995

BEFORE: **Honorable** RICHARD A. POSNER,
Chief Judge

Honorable JOEL M. FLAUM, Circuit Judge

Honorable DANIEL A. MANION,
Circuit Judge

Nos. 94-3349 and 94-3350

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAUL ORNELAS and
ISMAEL ORNELAS LEDESMA,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Wisconsin
No. 92 CR 243, Rudolph T. Randa, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

SUPREME COURT OF THE UNITED STATES

No. 95-5257

Saul Ornelas and Ismael Ornelas-Ledesma,
Petitioners

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition.

November 6, 1995